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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 139.

JAMES M. COBURN AND WILLIAM N. EWING,
APPELLANTS,

vs.

THE CEDAR VALLEY LAND AND CATTLE COMPANY
(LIMITED).

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1887.

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a UNITED STATES OF AMERICA, *sct:*

To the Cedar Valley Land and Cattle Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal from the decision of the circuit court of the United States for the western division of the western district of Missouri, in a cause wherein J. M. Coburn and W. N. Ewing are appellants and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellants in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, district judge of the United States for the western division of the western district of Missouri, this 2nd day of December, in the year of our Lord one thousand eight hundred and eighty-six.

A. KREKEL, *Judge.*

Service of the above accepted.

GEO. W. McCRARY,
Solicitor for Appellee.

[Endorsed:] 1043. Citation.

1 UNITED STATES OF AMERICA, *sct:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri, in a case wherein The Cedar Valley Land and Cattle Company is complainant and William N. Ewing and James M. Coburn are defendants.

In Chancery.

Be it remembered that heretofore, to wit, on the 10th day of October, A. D. 1885, in vacation of said court, the following proceedings were entered upon the order book of said court, to wit:

CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
against
WILLIAM N. EWING *et al.*

This day comes complainant, by its solicitors, Messrs. Geo. W. McCrary and Adams and Field, and files bill of complaint against defendants herein; thereupon it is ordered that a writ of subpœna issue, returnable in due course.

And the bill in chancery is in words and figures as follows, to wit:

To the honorable the judge of the circuit court of the United States for the western division of the western district of Missouri:

Your orator, The Cedar Valley Land and Cattle Company,

Limited, complaining of said defendants, says that complainant is
an alien, a foreign corporation duly created and organized under
and by virtue of the laws of the United Kingdom of Great Britain
and Ireland, and as such is a citizen and subject of said
2 kingdom; that defendants are citizens of the State of Missouri
and residents of the city of Kansas, in said State, and are now
and were at the dates hereinafter mentioned partners, and as such
doing business as brokers and real-estate dealers under the firm
name of Coburn and Ewing.

Heretofore, to wit, about the 1st day of December, 1884, Duncan Stewart, Lord George G. Campbell, George Burnett, James Graham, Thomas Kingscote, and George D. Fisher, then and now residents and subjects of said United Kingdom, having ascertained, through certain letters written by defendant Ewing to George Burnett and Duncan Stewart, that defendants were willing, in conjunction with the persons aforesaid, to subscribe to the capital stock of a corporation then about to be formed, agreed among themselves to become the promoters of a corporation to be created under the laws of said kingdom for the purpose of purchasing a ranch consisting of about seventy-five thousand acres of land and a large number of cattle and horses, then the property of William B. Munson and situated in the counties of Randall and Deaf Smith, in the State of Texas.

The name of said corporation was to be the Cedar Valley Land
and Cattle Company, Limited; and your orator is the identical
corporation then intended and in contemplation of the persons
aforesaid. Your orator became a corporation according to the laws
of said United Kingdom of Great Britain and Ireland on the 7th
day of January, 1885, but its existence was in contemplation and
being provided for long prior thereto by the persons aforesaid as its
promoters. On the 22nd day of December, 1884, said Duncan
Stewart, George Burnett, Lord George Campbell, and George D.
Fisher, in the city of London, styling themselves as your orator's
directors and acting as your orator's promoters by cablegram,
3 believing that defendants were willing to undertake and as-
sume the trust in behalf of said proposed corporation, directed
and requested them, the said defendants, to buy said ranch, land,
and cattle from said Munson at the very lowest terms for your
orator, and said defendant accepted the trust; and on the 31st day
of December, 1884, said defendants, in the name of W. N. Ewing,
in pursuance thereof, concluded negotiations with said Munson for
said ranch and purchased the same for your orator; and to that end
said Ewing and Munson entered into a written contract, signed by
them in their individual names, wherein it was agreed that said
Ewing had purchased said ranch and cattle and land upon the following terms, viz:

This instrument witnesseth a contract between W. B. Munson, of Grayson, Texas, and W. N. Ewing, of Kansas City, Missouri, by the terms of which it is agreed,

I.

That the said W. B. Munson has this day bargained and sold unto the said W. N. Ewing, for the consideration hereinafter stated :

1st. About seventy-five thousand (75,000) acres of land in Randall and Deaf Smith counties, in the State of Texas, being all the lands now claimed or owned solely by the said Munson in said counties connected with or appertaining to the said Munson's Paladuro ranch, in said Randall and Deaf Smith counties, to be more particularly described by a schedule to be annexed hereto, marked "A."

2nd. All the cattle owned by said W. B. Munson on the ranch aforesaid and in the Dixon Creek pastures (in Carson and Hutchinson counties), the same to include all the cattle now owned and claimed by said Munson not branded or in the following brands, viz., Crescent G., T. Anchor, G. M. S., F. O., with bar and without, and all now on the ranch and pasture aforesaid, or that may
4 be, before August 1st, 1885, *be* on said ranch and belonging to said Munson.

3rd. All the horses and mules owned by said W. B. Munson on the said Paladuro and Dixon Creek ranches.

4th. All range and ranch rights now owned and enjoyed by said W. B. Munson in connection with said Paladuro ranch, all the lease of lands held by said Munson connected with or appertaining to said ranch, all wagons, harness, branding irons, blacksmith and carpenter tools, furniture and property of every description owned and used by said Munson in connection with said ranch. An inventory not to be exclusive of items omitted but properly embraced in the above description will be appended hereto as Exhibit "B."

II.

1st. That said W. B. Munson shall, on or before May 1st, 1885, present to said Ewing's attorneys, in Kansas City, Missouri, duly certified or original evidences of the titles to the lands hereinbefore mentioned, and shall make to the said W. N. Ewing good and sufficient deeds, with covenants of good right to convey in fee, of warranty title and freedom from all and all manner of incumbrances (save taxes for the year 1885), to be subject to the provisions of this contract, to such of said lands as the attorneys aforesaid shall determine the said W. B. Munson owns in fee by title clear and unincumbered, and to make similar deeds to such of said lands as said Munson, within sixty days after said 1st day of May, 1885, shall, in the opinion of the attorneys aforesaid, upon evidence of title furnished by said Munson as aforesaid, have perfected his title to.

2nd. That said Munson shall, from May 1st, 1885, to August 1st, 1885, at his own proper expense and charges, gather and de-
5 liver to said Ewing, at said Paladuro ranch aforesaid,—in pens and chutes prepared by said Munson at his own cost and expense ; that the said Munson shall make all proper preparations for the counting and actual delivery of said cattle, and until so actually delivered all expense of gathering, penning, keeping, and feeding said cattle shall be borne by said Munson, except as hereinafter pro-

vided; that said delivery may commence at any date after May 1st, 1885, and may continue from time to time until August 1st, 1885, as said cattle are gathered. It is understood, however, between said parties that this sale includes all the cattle at the places and in the brands described in paragraph I hereof, whether gathered, counted, or actually delivered or not.

3rd. The horses and mules aforesaid shall be delivered by said Munson between said May 1st, 1885, and August 1st, 1885, at the said Paladuro ranch, at such times and in such numbers as the said Munson may desire, except twenty-five (25) head of horses and two spans of mules, to be an average of all in use on said ranch which the said Munson shall deliver, when and as demanded by said Ewing, on said ranch as aforesaid.

4th. The said Munson shall deliver to the said Ewing possession of all other property hereby sold not embraced in the three preceding subdivisions of this paragraph on or before August 1st, 1885.

5th. On the day of the execution of this contract the said Munson shall make and deliver to the said W. N. Ewing a bond, with sureties to be approved by the said Ewing, in the sum of two hundred thousand (200,000) dollars, conditioned for the faithful and prompt performance upon his part of all the stipulations of this contract and for the payment of all such damages as may be sustained by said W. N. Ewing, his heirs and assigns, for or on account of any delay or failure of performance of this contract in all its details by the said Munson.

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III.

That said W. N. Ewing, in consideration of the foregoing, has agreed:

1st. At the execution of this instrument to pay the said Munson the sum of one hundred thousand dollars in cash.

2nd. At the execution of the deeds provided for in the 1st subdivision of paragraph II hereof to pay to the said Munson the sum of two dollars per acre, in cash, for the lands described and conveyed by such instruments.

3rd. After the delivery of thirty-five hundred head of cattle, bulls excepted, and thereafter as that number are delivered until two hundred thousand dollars' worth at the rate of eighteen (18) and $\frac{50}{100}$ dollars per head, to pay in installments for said deliveries up to said sum the sum of nine (9) and $\frac{25}{100}$ dollars per head; and after the delivery of said two hundred thousand (200,000) dollars' worth, then, as deliveries are made and aggregate thirty-five hundred head, to pay the sum of eighteen (18) and $\frac{50}{100}$ dollars per head; and to pay for said bulls (over one year old) as delivered at the rate of eighteen (18) and $\frac{50}{100}$ dollars per head from the beginning, and for each of three of every four bulls delivered the additional sum of forty-one and $\frac{50}{100}$ dollars—seventy-five per cent. of said bulls being delivered at the rate of sixty dollars per head.

4th. To pay to said Munson, as delivered, the sum of fifty dollars per head for all the horses and mules delivered pursuant to subdivision — (3) of paragraph II hereof.

5th. To pay to said W. B. Munson, on August 1st, 1885, five per centum upon the sum of the value of all cattle delivered by him up to that date, estimating the same at the rate of eighteen and $\frac{50}{100}$ dollars per head, as the consideration in full of cattle sold hereby and not gathered and delivered, and in addition five per centum upon seventy-five per cent. of the bulls delivered, at the rate of
7 forty-one (41) and $\frac{50}{100}$ dollars.

IV.

1st. That the said W. B. Munson, in gathering and keeping the cattle hereinbefore provided to be delivered, shall, by himself and his employees, use care and diligence to prevent any injury to or abuse of said cattle; that the cattle delivered and received by said Ewing shall be free from injury caused by improper handling in gathering and keeping the same; and the horses and mules to be delivered under this contract shall be in good condition and free from injury or damage on account of hard use or rough handling between this date and the date of delivery. Injury and damage caused by reasonable use in rounding-up cattle shall not be included in this provision. "Good condition," as understood above, means such condition as may result from reasonable care and use in view of the work to be done under this contract.

2nd. That the said Ewing shall not, until August 1st, 1885, use any branding iron or brand any cattle or horses on the ranch purchased hereby, except those horses and cattle actually delivered to him, and as to them only at the delivery; nor shall said Ewing, until the date aforesaid, have any right to work with or among said cattle, except those delivered at said delivery pens, and only at said pens.

V.

That all payments herein provided to be made by said Ewing to said Munson may be made at the Traders' Bank, Kansas City, Missouri, or in the city of New York, as the said Munson may elect.

VI.

That the said W. N. Ewing, at his election, may make the last payment, aggregating the sum of one hundred thousand dollars, or any less sum as he may determine, for and upon the cattle herein contracted to be delivered, twelve months after January 1st, 1885, provided such sum, the payment whereof shall be thus
8 deferred, shall bear interest, from said January 1st, 1885, at
the rate of six per cent. per annum, and shall be evidenced by the note of said W. N. Ewing and secured by a lien on all the property herein sold by said Munson to said Ewing.

VII.

That if the said W. N. Ewing shall fail to perform his obligations under this contract on or before August 1st, 1885, then the sums that may have been paid by him hereunder shall not be forfeited; but at any time after August 1, 1885, R. Y. Rue, of Sherman, Texas; or if he should fail to act for any cause, then Charles Goodnight, of Armstrong county, Texas; or if he should fail from any cause to act, then the then acting sheriff of Dallas county, Texas, or any of his deputies, at or upon the request of either party hereto, shall be authorized, after three months' advertisement in three daily papers in the State of Texas—one at Dallas, one at Galveston, one at San Antonio—to sell all the property herein conveyed and described as an entirety to the highest bidder, for cash, at the court-house door, in the city of Dallas, Texas, and make conveyance and bills of sale thereof valid in law and binding the parties hereto and their assigns and receive and receipt for the purchase-money, and apply the same, first, to the payment of all expenses of sale, including advertisements, auctioneer's fees, a reasonable sum to said Roe, Goodnight, or sheriff, as the case may be, not to exceed one thousand dollars; second, to the payment of the sums that may remain due the said Munson, and, lastly, the remainder shall be paid to the said Ewing.

In determining the amount due Munson under this contract, if this provision is to be executed, the count of cattle and horses and mules which said Munson may have made before said August 1st, 1885, stated by him in writing and signed, shall be considered and estimated as the number of said cattle, horses, and mules sold under this contract by the said Munson to the said Ewing, and the
9 prices as fixed in this contract shall be used in making the
estimates, and if the lands have not been conveyed and paid for as hereinbefore provided the amount due by said Ewing for land shall be two (2) dollars per acre for all lands embraced herein, the titles to which may be, in the written opinion of some competent attorney, *be* considered good and perfect in the said W. B. Munson, and from the whole sum thus found to be due for land, cattle, horses, and mules there shall be deducted all payments made by said Ewing under this contract, and the remainder, with interest at the rate of six per cent. per annum from June 1st, 1885, shall be the sum due said Munson. The said Munson shall have the right in common with all others to bid for said property, and, if his bid is the highest bid, to become the purchaser, and the amount received by said Munson from said sale shall be in full satisfaction of all demands on said Ewing growing out of this contract on any form whatsoever.

VIII.

That the said W. B. Munson warrants unto the said W. N. Ewing and his assigns that there are no squatters, nesters, or other trespassers upon the lands held by said Munson under lease transferred herein to said Ewing; that ranch and range, the rights and privileges whereof have been this day sold by said Munson to said Ewing, are free from all other located brands and stocks of cattle than those sold hereby to said Ewing, and that all the property hereby sold the said Ewing shall at the delivery thereof hereinbefore provided be free from all encumbrances, and the right and title thereto passing

by this instrument shall be entire and perfect and absolute and free from all claims and liens whatsoever, whether created by statute,
common law, equity, or contract or by any or all of them
10 combined, and that — are no cattle in the brands described
herein in the Pan Handle of Texas except such as are hereby
conveyed, and the title to all in said brands in said territory is warranted.

IX.

That said Munson is to pay all taxes and rents accruing upon all the property embraced in this contract up to January 1st, 1885, and all taxes and rents thereafter are to be paid by said W. N. Ewing; that said Ewing shall fulfill the obligations of said Munson under a contract for the construction and removal of about 47 miles of fence on said Paladuro ranch, now in the process of erection, and hold the said Munson harmless from any liability on account of said contract, provided the said Ewing shall not be required to pay on said contract more than the sum of nine thousand (9,000) dollars; that the said W. B. Munson is to furnish board and all expenses for all the men employed by himself in gathering and delivering said cattle and for all the men employed by said Ewing for receiving and holding the cattle when delivered, and the said Ewing is to pay for the board and expenses of men employed by him at the rate of fifteen dollars per month, and is to pay their wages and also the wages of five men to be under the direction of said Munson or his boss in keeping the delivered and undelivered cattle separated, it being understood that all the expenses of said ranch and men up to August 1st, 1885, are to be paid and borne by said W. B. Munson except the wages and board above provided to be paid by said Ewing from May 1st, 1885.

X.

That in the event of any disagreement between the parties hereto or their assigns respecting the rights, obligations, liabilities, or
duties of either under this contract or growing out of any breach
11 or supposed breach by either such disagreement or contro-
versy shall be settled by the arbitrament of two disinterested persons, one to be selected by each party, or if they fail to agree then by the award of one of such arbitrators concurred in by an umpire to be selected by said arbitrators, said arbitrators to hear the statement of said parties, examining this contract, and hear such other evidence as they may deem relevant and proper at such sitting or sittings as they may appoint; and the said arbitrators may, at their discretion, agree upon the umpire in advance to sit with them in the hearing of said controversy, or they may appoint him after such hearing and after they have failed to agree, and in that event the said controversy can be determined by him and said arbitrators upon said arbitrators' statements of the evidence and his agreement with one of the said arbitrators in an award; and the award of said arbitrators, if they agree, or if they disagree then the

award of one of said arbitrators and the umpire, reduced to writing and signed by them and delivered in duplicate to each of the parties, shall be considered and treated in all courts as the agreement of settlement between said parties of all matters embraced in said award, and as such agreement and settlement shall be provable and enforceable in all courts having jurisdiction, and neither party shall have any cause of action in any court growing out of the breach of the other of any provision of this contract until in good faith he has made an honest effort to have the matter complained of arbitrated under the terms of this paragraph. This paragraph embraces liability, except upon the bond to be given by said Munson, as hereinbefore provided, upon all other rights and liabilities incident to this contract.

XI.

1st. That if the lessor of the lands held by said Munson
12 should not consent for the assignment of said lease, as pro-
vided for in subdivision four (4) of paragraph II hereof, then the said lease shall be held by said Munson as now, and for the use and benefit, however, of said Ewing or his assigns, and the said Ewing or his assigns shall pay the rent and charges on said lease required by the terms thereof to be paid by said Munson after January 1st, 1885.

2nd. That said Munson shall not deliver under this contract any cattle purchased from other parties after this date or put upon said ranch or pasture cattle to be delivered under this contract brought from other cattles belonging to him or obtained from other persons.

In evidence whereof the parties hereto have affixed their names to this and a triplicate original hereof this 31st day of December, 1884.

W. B. MUNSON.
W. N. EWING.

Witness:
WM. MEGINNS.

Said contract, although made in the name of said Ewing, was in reality made for and in behalf of your orator, then in contemplation of corporate existence, and also the employment aforesaid of said Ewing by said promoters, as well as said contract of purchase, was in contemplation of said proposed corporate organization. Both said promoters and defendants and all persons concerned and interested understood and intended that the same should be adopted by your orator when incorporated and inure to its benefit; and your orator
further says that after its corporate organization and exist-
13 ence was complete your orator as such corporation, in pur-
suance of the aforesaid understanding, did adopt and ratify what had been done by its promoters as aforesaid, and did proceed to carry out and comply with all the terms and conditions of said contract, including the payment of the sums of money therein provided, so that in equity your orator as such corporation became entitled to all the benefits and advantages of said contract; and, be-

sides, your orator says that said Ewing, after said written contract was signed by said Munson and delivered to defendants on behalf of your orator, as in duty bound, declared in behalf of your orator a written declaration of trust signed by said Ewing in words and figures as follows, viz:

This instrument witnesseth: That the sum of one hundred thousand dollars provided to be paid by me to W. B. Munson in cash upon the execution of a contract between me and the said W. B. Munson this day drawn up, by which the said Munson contracts to sell to me certain lands and cattle, etc., therein described, belongs to and is the property of the Cedar Valley Land and Cattle Company, and this declaration of trust is made by me for the protection of said company in the event of my death or other accident to me before the intents of me and the said company shall be declared and made known by the proper writings between us.

Witness my hand this 31st December, 1884, hereunto set in the presence of—

(Signed) W. N. EWING.

On the 31st day of December, 1884, in order to comply with said contract, at the suggestion of said defendants, the promoters last aforesaid, viz., said Stewart, Burnett, Campbell, and Fisher, having in their hands certain funds held in trust for your orator, then intended to be incorporated, remitted in behalf of your orator, by cablegram from London, England, to said defendants at the
14 city of New York about twenty thousand and six hundred
lbs. sterling, English money, making at rate of exchange in New York $99,791.80, to be paid by defendants for your orator to said Munson in accordance with said contract of purchase. Said sum of money was duly received by defendants at New York upon the trust aforesaid in behalf of your orator; and defendants well knew that said sum had been raised for your orator for the purpose aforesaid; and until the times hereinafter mentioned your orator, having implicit confidence in defendants, supposed and believed that said sum of money was paid in good faith to said Munson in true compliance with the terms of said contract.

After your orator had been duly incorporated, defendants, in accordance with their understanding with the promoters aforesaid, subscribed for two thousand shares of the capital stock of your orator at the par value of ten lbs. sterling, English money, per share, one-half thereof to be paid on the issue of certificates of stock; and defendants, prior to the 7th day of January, 1885, and at the time of receiving said money, treated your orator as a corporation and acted towards it as such and acknowledged its corporate existence, and that said sum of money was held in trust for it and said contract was made for its benefit.

And on the 5th day of May, 1885, after your orator had become incorporated as aforesaid, in order to meet the second payment provided for in said contract with said Munson, your orator, by cablegram from London, remitted to defendants at the city of New York

about twenty-nine (29) thousand lbs. sterling, English money, making at rate of exchange in New York $139,912.50. Said sum of money belonged to and was the property of your orator, and was intrusted by it to the said defendants for the purpose aforesaid, and said money was received by said defendants about the day
15 last aforesaid and upon the trust above mentioned; and your orator, trusting in defendants, firmly believed, until the time hereinafter mentioned, that defendants had duly paid all of said sum of money to said Munson for the purpose aforesaid; and on the 18th day of June, 1885, your orator, in order to comply further with said contract of purchase on its part, at the suggestion of defendants remitted to them from London, in order to meet the third installment due said Munson for the cattle delivered by him to said defendants on behalf of your orator, the sum of about thirty-seven thousand lbs. sterling, English money, making at rate of exchange $179,935.00. Said money was on said day, in the city of New York, received by defendants for the purpose aforesaid and as a trust fund belonging to your orator, to be by said defendants paid to said Munson in accordance with and in fulfillment of said contract on your orator's part; and your orator, relying upon defendants, believed that they had properly disbursed said moneys under said contract as they had undertaken and agreed to do, and that they had purchased said ranch, land, and cattle at the lowest price at which they could reasonably be obtained.

But in the month of August, 1885, your orator was informed, and now charges the fact to be, that after said defendants had obtained the confidence of your orator and had been entrusted with all its interests in the purchase aforesaid they betrayed said trust and combined and confederated together for the purpose of cheating and defrauding your orator, and agreed between themselves that instead of acting in the interest of your orator, as they were in duty bound to do, they would use their position as agents of your orator to their own profit and special advantage and to the utter disregard of that of your orator. Thereupon, instead of purchasing said ranch and cattle and land at the lowest prices, as they had been di-
16 rected to do in behalf of your orator, they agreed to pay for 75 per cent. of the bulls sold to your orator the sum of $60.00 per head, a sum about $18,000.00 greater than that at which said Munson was willing to sell; and at the time of making said contract with Munson defendants, in order to gain an advantage at the expense of your orator, secretly agreed with said Munson to take a commission on the sale of said property under the pretence of representing the interests of said Munson, while in truth and in fact the interests of your orator and said Munson in said transaction were diverse and incompatible and could not, from the nature of the employment, be both represented by the same persons. In pursuance of their design to cheat and defraud your orator said defendants, upon the payment of the first installment of one hundred thousand dollars to said Munson, appropriated to their own use a large portion thereof, to wit, as your orator is informed and believes and so charges the fact to be, about the sum of ten thousand

dollars; and from the monies sent by your orator for the payment of the second installment to said Munson said defendants fradulently retained for their own use a large sum, to wit, about fifteen thousand dollars, as your orator is informed and charges the fact to be; and from the third installment, consisting of monies sent by your orator as aforesaid and entrusted by it to defendants to pay said Munson, said defendants fraudulently appropriated to their own use a large portion, to wit, about fifteen thousand dollars, as your orator is informed and verily believes and now charges the fact to be. Your orator alleges that the sums aforesaid were appropriated by defendants under the form of a pretended commission from said Munson; and your orator is further informed and believes and alleges that while defendants were pretending to represent the interests of
17 your orator in the transactions aforesaid with said Munson
they, in order to gain an advantage to themselves thereby and make a profit, retained a large part of one of the instalments of money sent them by your orator, viz., about the sum of sixty thousand dollars, and in lieu thereof conveyed to said Munson a building situated in the city of Kansas, on the south 30 feet of the east 90 feet of lot 179, block 18, Old Town, at a valuation of seventy-five thousand dollars, subject to an encumbrance of fifteen thousand dollars, whereas in truth and in fact said building, encumbered as aforesaid, was really worth less than forty-five thousand dollars. By reason of this unauthorized use of your orator's funds and by virtue of the position of trust and confidence they held towards your orator said defendants made and secured to themselves a large profit, viz., about the sum of fifteen thousand dollars. Your orator further says that all the acts of bad faith aforesaid whereby defendants retained said monies and profits were unknown to your orator until the month of August, 1885, and were purposely, carefully, and studiously concealed by defendants from your orator. When your orator ascertained the facts hereinbefore stated it demanded in writing of defendants that they account for and pay over to your orator all the monies and profits thus covinously and fraudulently appropriated and retained by them, and defendants have hitherto refused and still refuse to render any account thereof whatever to your orator.

In the accounts and statements heretofore rendered by defendants concerning the transactions aforesaid no mention was made of any of the matters or things herein complained of, but the same were kept secret and hidden from your orator by defendants herein.

Your orator is informed and believes that defendants claim as a credit in their account with your orator certain sums of
18 money paid by them on account of said shares of stock sub-
scribed by them and certain amounts paid by them for cablegrams and expense of traveling and attorney's fees incurred by them in behalf of your orator in connection with the purchase of said ranch.

Whether defendants have otherwise profited by their said position of trust your orator does not know and cannot truly ascertain unless an accounting be had of all the matters and things entrusted to the charge of defendants as aforesaid.

Defendants sometimes allege and pretend that they were the agents of said Munson in the sale of said ranch and cattle, and as such entitled to a commission from him, and that the sums hereinbefore mentioned were paid by said Munson, whereas your orator charges that the defendants pretended to act in behalf of your orator, accepted the trust reposed in them by your orator and promised faithfully to execute the same, and thereby induced your orator to intrust the interests concerning the purchase aforesaid wholly in defendants' hands; and therefore your orator says that defendants sustained such a relation of trust and confidence to it and its interests as to preclude them in conscience from acting for and receiving compensation from the said Munson; and your orator says that the sums aforesaid received and appropriated by defendants, whether under the pretence of commissions from said Munson or otherwise, were in reality monies of your orator for which defendants, as they well knew, were bound faithfully to account to it, and if it be true that defendants bargained with said Munson to receive from him or to retain from the purchase-money paid by your orator a commission the same was a breach of defendants' trust and a fraud upon your orator and a mere device and subterfuge resorted to by defendants in order to conceal and cover up their fraud and covin above set forth.

19 Your orator further says that all the actions, doings, and pretenses aforesaid are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in their premises in this hon. court, where matters of this nature are properly cognizable and relievable, your orator prays that an accounting be ordered between your orator and defendants of all monies entrusted to their care in the manner aforesaid, and that defendants be required to render a just and true account thereof in all respects and set forth what sums were paid by them to said Munson and when and on what account paid and all sums retained or appropriated to their own use and that the value of the building aforesaid so sold to said Munson be ascertained with a view of compelling defendants to account for the profits made in the use of complainants' money, and that defendants be decreed to pay over to your orator all sums found justly due by reason of the premises, and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this hon. court shall seem equitable and right, and that a writ of subpœna be granted to your orator, directed to said William N. Ewing and James M. Coburn, commanding them on a day certain to be and appear in this hon. court, then and there to answer all and singular the premises, but not under oath, which is hereby expressly waived, and to stand, perform, and abide such further order, direction, and decree as may be made against them.

GEO. W. McCRARY,
ADAMS & FIELD,
Solicitors for Plantiff.

GEO. W. McCRARY, *Of Counsel.*

20 And thereupon a subpœna in chancery was issued against said defendants and delivered to the marshal, and the same was afterwards, to wit, on the 10th day of October, A. D. 1885, returned into the clerk's office duly served. Said subpœna in chancery and return thereon are in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } sct:
Western Division of the Western District of Missouri, }

The President of the United States of America to William N. Ewing and James M. Coburn, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri, on the first Monday of November next, at the city of Kansas, then and there to answer the bill of complaint of the Cedar Valley Land and Cattle Company, Limited, a corporation of the United Kingdom of Great Britain and Ireland, filed against you the 10th day of October, A. D. 1885. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 10th day of October, 1885.

Issued at office, in the city of Kansas, under the seal of [SEAL.] said court, the day and year last aforesaid.

H. C. GEISBERG,
Clerk of said Court,
By WARREN WATSON, *D. C.*

MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which this writ is returnable, otherwise the bill may be taken *pro confesso.*

H. C. GEISBERG, *Clerk,*
By WARREN WATSON, *D. C.*

21 UNITED STATES OF AMERICA, } sct:
Western Division of the Western District of Missouri, }

I do hereby certify that I executed this writ by delivering a true copy of the same to each of the within-named William N. Ewing and James M. Coburn, in Kansas City, Mo., Oct. 10, 1885; all done in the western division of the western district of Mo.

JOSEPH H. McGEE,
U. S. Marshal, Western District of Missouri,
By D. P. WHITMAN, *Deputy.*

Marshal's fees: 2 services at $2.00, $4.00.

And afterwards, to wit, on the 2nd day of November, A. D. 1885, the following entry appears of record, to wit:

CEDAR VALLEY LAND AND CATTLE CO. }
against }
WM. N. EWING *et al.* }

This day come defendants, by their solicitors, Messrs. Waters and

Chase and Karnes and Ess, and enter their appearance herein and file answer to complainant's bill of complaint.

Said appearance is in the words following, to wit:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
Plaintiff,
vs.
WILLIAM N. EWING and JAMES M. COBURN, Defendants.

On this day come the above-named defendants, William N. Ewing and James M. Coburn, and enter their appearance in the above-entitled cause.

KARNES AND ESS,
Defendants' Attorneys.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

22 THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
Complainants,
versus
J. M. COBURN and W. N. EWING, Defendants.

Entry of Appearance by Defendants.

The defendants, J. M. Coburn and W. N. Ewing, hereby enter their appearance in the above-entitled action and to the bill of complaint filed herein by the complainant.

Dated at rule day in November, 1885.

KARNES AND ESS AND WATERS AND CHASE,
Solicitors for Defendants.

And afterwards, on the 8th day of December, A. D. 1885, the following entry appears of record in said cause, to wit:

CEDAR VALLEY LAND AND CATTLE CO.
against
WM. N. EWING *et al.*

This day come defendants, by their solicitors, Messrs. J. C. Waters and Karnes and Ess, and file answer herein and take leave to file cross-bill.

Said answer is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
WILLIAM N. EWING and JAMES M. COBURN, Defendants.

23 *Answer of Defendants.*

The defendants, William N. Ewing and James M. Coburn, for

answer to the bill of complaint of the complainant say that they admit that the complainant is an alien corporation, created and organized under the laws of Great Britain, and is a subject and citizen of said kingdom. They admit that the defendants are now and were at all times alleged in said bill of complaint copartners, trading and doing business as brokers and real-estate agents under the name of Coburn and Ewing, at Kansas City, in the State of Missouri, and that they are citizens of the State of Missouri. These defendants admit that Duncan Stewart, Lord George Campbell, George Burnett, James Graham, Thomas Kingscote, and George D. Fisher are citizens of Great Britain, but are unadvised as to their relations each with the other in relation to the promotion or formation of any corporation whatever. The defendants, further answering, admit that the Cedar Valley Land and Cattle Company first became a corporation of the Kingdom of Great Britain on the 7th day of January, 1885. These defendants further admit that a contract was entered into between W. B. Munson and the defendant, W. N. Ewing, the terms of which contract are substantially as alleged in complainant's bill of complaint, and under the circumstances and by the direction and authority hereinafter stated; that the defendants further admit that the defendant Ewing made and executed a certain other contract in writing with said Munson, as alleged in complainant's bill of complaint, and under the circumstances and by the direction and authority hereinafter alleged. The defendants further admit that they received, on or about the 4th day of January, 1885, the sum of $99,791.80, or thereabouts, from complainant, and under the circumstances hereinafter alleged; that the defendants afterward received the further sums of money alleged in complainant's bill of
complaint from complainant, and under the circumstances
24 hereinafter alleged.

These defendants, further answering, say that they deny, with the exception of the foregoing admissions, every other material averment in the bill of complaint as the same is therein charged and alleged.

These defendants, further answering, say that the Cedar Valley Land and Cattle Company first came into existence and was first incorporated on the 7th day of January, 1885; that it had no existence or organization prior to that time, and that the said company, when organized, had for its principal and only object the purchase of cattle and land in the State of Texas, and operating thereon and thereat a cattle ranch. (These defendants further allege and charge the fact to be that the whole purpose of its incorporation and organization was the transaction of a land and cattle business in the State of Texas, and that the same is not authorized or permitted under the laws of the State of Texas and is illegal.)

The defendants further say that defendants have been for a long period of time and prior to the time alleged in the bill of complaint engaged as a firm in the sale of cattle ranches on commission for a livelihood and profit; that this has been and is their principal occupation and pursuit; that long prior to any of the times alleged in the bill of complaint the defendants had upon their books and for

sale the cattle ranch mentioned in the bill of complaint to whoever
might purchase the same and for a consideration to be paid by said
Munson; that these defendants have never at any time been pro-
moters of said complainant's corporation nor have they at any time
had any agreement or understanding with Duncan Stewart, Lord
George Campbell, James Graham, Thomas Kingscote, or George
Fisher or any of them, but, on the contrary, allege the fact
25 to be that George Burnett, a promoter and director of said
complainant corporation, for himself and acting for himself
alone and without disclosing to the defendants that he had any asso-
ciates interested or to be interested with him, and without any
knowledge on the part of the defendants that there was any person
other than the said George Burnett embraced or included in the
matter, and with full knowledge on his part that the defendants
were dealers in cattle ranches and for a compensation to be paid by
the sales of such cattle ranches, and with full knowledge that the
defendants at the time had the aforesaid Munson ranch for sale and
was to be paid by Munson a reasonable compensation for its sale,
then directed and authorized the defendants to purchase said ranch
and upon the terms and conditions and price which *was* substan-
tially agreed upon and carried out, and that in all the contracts the
defendants or either of them entered into or made relating to said
cattle ranch or its purchase the same was done pursuant to the ex-
press order, direction, and authority of George Burnett and without
any reference to any privity with the complainant or any of the
persons alleged to be promoters in said bill of complaint, the said
George Burnett knowing, expecting, and agreeing with the defend-
ants that their pay in the sale of said ranch should come from W.
B. Munson and not from them or any of them; that the defendants,
in good faith and acting in direct accordance with the contract and
agreement between them and the said Munson and having no
knowledge of the relations that said George Burnett had with any
of the persons named in the bill or as a promoter or director of the
corporation thereafter formed, purchased said ranch and entered
into all of said contracts, and that the terms of said contracts, the
form thereof, and every condition therein *was* in obedience to the
direction of the said George Burnet, and with whom only these de-
fendants had to do. These defendants deny that they had any
privity with any person as a promoter of said complainant
26 or with the complainant itself; that all their acts and doings
in relation to the purchase of said ranch *was* in the best of
faith and strictly pursuant to the orders and with the knowledge of
the said George Burnett.

These defendants further state that the said George Burnett was named in the articles of association of the complainant corporation one of its original directors, and continued to be and acted as director until the day of his death, which occurred some time about the month of March, 1885.

These defendants, further answering, say that it was provided in and by the articles of incorporation of the complainant, in substance, that no director of the company should be required or compelled to pay or refund to the company any profits accruing to him by reason of any contract made by him or with any company or person or partnership with which he was interested or as party with the complainant, and that such article has at all times been and now is unrepealed and in full force.

These defendants, further answering, say that by virtue of the arrangement between Burnett and these defendants the said Burnett was to receive a portion of the compensation paid by Munson to them, and that the complainant is not entitled to ask for or receive from these defendants or from said Burnett any portion of the compensation so received by them.

These defendants, further answering said bill, say that the complainant, since its organization, has at all times known and the persons alleged in said bill have at all times known that the services of said defendants in the examination of said ranch and the time they expended in relation to the same and in the sale of said ranch to whomsoever might buy would amount to a large sum of money, to which the defendants were justly entitled; and these defendants further aver the truth to be that neither the persons alleged 27 in said bill, other than said George Burnett, prior to the incorporation of the complainant, nor the said complainant, since its incorporation, have ever expected or intended to pay to the said defendants or either of them for such services, nor have they at any time tendered any sum whatever for the services rendered by defendants in the sale of said ranch; that the complainant, as the defendants have hereinbefore alleged, first came into existence on the 7th day of January, 1885, and that after it became organized it then adopted the agreement already made with Munson, and it knew and each one of its directors knew the exact price paid for everything, and had as full knowledge of the transaction and what was to be paid for the ranch as these defendants or the said Munson.

These defendants further state that the said complainant has no rights which antedate its existence; that the matters complained of and the alleged frauds attempted to be charged in said bill and as appears by said bill were, if committed at all, committed prior to the existence of the complainant.

These defendants further state that they purchased said ranch for $100,000 less than its actual intrinsic or market value.

These defendants further state that, in pursuance of their agreement and contract with said Burnett, they received from said Munson a moderate and reasonable compensation for their services rendered, and no more; that they were entitled to be paid for their services, and, knowing that said Burnett had such knowledge and expected the defendants so to do, received the same and now have the same, and hold the said Burnett's portion for the benefits of the ones properly entitled thereto.

These defendants further state that, regardless from whom the said compensation was to be received, whether from Munson or the persons alleged in said bill, they were entitled to be paid 28 for their services, and had the complainant or the persons alleged in said bill given these defendants to understand or be inferred that they or any of them were to pay the same the acts of the defendants would have been exactly the same.

The defendants further state that a reasonable compensation for their services in the sale of said ranch was the sum of $50,000.

These defendants further state that afterwards—after the complainant had been organized—it desired these defendants to subscribe to its capital stock, and these defendants, upon the one and only condition that the defendant, W. N. Ewing, should be made the manager of said complainant for the period of five years thereafter, agreed with complainant to subscribe and did subscribe for $100,000 of its capital stock, and that pursuant to said contract between them the complainant appointed the said W. N. Ewing manager of its affairs and concerns for the period of five years, and that the same was all the agreement and all the connection or privacy ever had between the complainant and the defendants.

These defendants, further answering said bill of complaint, now and here expressly deny every other allegation contained in said bill, and now, having answered said bill fully and completely, they pray to be hence dismissed with their costs.

KARNES AND ESS,
WATERS AND CHASE,
Solicitors for Defendants.

The order of court granting leave to file cross-bill is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

29 THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
WILLIAM N. EWING and JAMES M. COBURN, Defendants.

Defendants have leave to file cross-bill in above suit, and service is ordered to be made on Hon. Geo. W. McCrary, complainant's solicitor, — to be found within the jurisdiction of this court.

A. KREKEL, *Judge.*

And afterwards, at the October term of said court, and on the 31st day of December, A. D. 1885, the following entry appears of record, to wit:

CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
against
WM. N. EWING *et al.*

The following order was this day signed and filed and ordered to be recorded, to wit:

CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
vs.
COBURN and EWING.

Now comes complainant and files exceptions to the answer of defendants for impertinence; and on application of complainant it is ordered that the exceptions so filed be referred to John K. Cravens, master in chancery, with instructions to examine the same in connection with the answer of defendant and report his finding thereon on or before the 20th day of January, 1886.

It is further ordered, upon good cause shown, that the time
30 for filing exceptions for insufficiency to the answer in said
cause be extended until the rule day in February, 1886, and that on or before that day said complainant may, at *his* option, file exceptions to said answer or reply thereto.

A. KREKEL, *Judge.*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
W. N. EWING and JAMES M. COBURN, Defendants.
} In Equity.

Exceptions Taken by said Complainant to the Impertinent Answer of said Defendants.

Now comes said complainant and excepts to the answer of said defendants for impertinency in the following particulars:

1st. The allegation and charge therein that the whole purpose of complainant's incorporation was the transaction of land and cattle business in the State of Texas, and that the same is not authorized or permitted under the laws of the State of Texas and is illegal.

2nd. The allegation and charge therein that long prior to any of the times alleged in the bill of complaint defendants had upon their books and for sale the cattle ranch mentioned in the bill of complaint to whoever might purchase the same and for a consideration to be paid by said Munson.

3rd. The allegation and charge therein that George Burnett, a promoter and director of said complainant corporation, and acting
for himself alone, and without disclosing to the defendants that
31 he had any associates interested or to be interested with him,
and without any knowledge on the part of defendants that there was any person other than the said George Burnett interested in the matter, and with full knowledge on his part that the defendants were dealing in cattle ranches and for a compensation to be paid by the sale of such cattle ranches, and with full knowledge that the defendants had the said Munson ranch for sale and *was* to be paid by Munson a reasonable compensation for its sale, then directed and authorized defendants to purchase said ranch and upon the terms and conditions of price which *was* substantially agreed upon and carried out, and that in all the contracts the defendants or either of them entered into or made relating to said cattle ranch or its purchase the same was done pursuant to the express order, direction, and authority of George Burnett and without any reference to any privity with the complainant or any of the persons alleged

to be promoters in said bill of complaint, the said George Burnett knowing, expecting, and agreeing with defendants that their pay in the sale of said ranch should come from W. B. Munson and not from them or any of them; that defendants, in good faith, and acting in strict accordance with the contract and agreement between them and the said Munson, and having no knowledge of the relations that said George Burnett had with any of the persons named in the bill or as a promoter or director of the corporation thereafter formed, purchased said ranch and entered into all of said contracts, and that the terms of said contract, the form thereof, and every condition therein *was* in obedience to the direction of said George Burnett and with whom only the defendants had to do.

4th. The allegation and charge therein that the acts and doings of defendant in relation to the purchase of said ranch *was* strictly pursuant to the orders and with the knowledge of said George Burnett.

32 5th. The allegation and charge therein that said George Burnett was named in the articles of association of the complainant corporation one of its original directors and continued to be and acted as director until the day of his death, which occurred some time about the month of March, 1885.

6th. The allegation and charge therein that it was provided in and by the articles of incorporation of the complainant, in substance, that no director of the company should be required or compelled to pay or refund to the company any profits accruing to him by reason of any contract made by him or with any company or person or partnership with which he was interested or as party with the complainant, and that such article has at all times been and now is unrepealed and in full force.

7th. The allegation and charge therein that by virtue of an arrangement between Burnett and these defendants said Burnett was to receive a portion of the compensation paid by Munson to them, and that complainant is not entitled to ask for or receive from these defendants or from said Burnett any portion of the compensation so received by them.

8th. The allegation and charge therein that the complainant since its organization has at all times known *of* the services of said defendants in the examination of said ranch and the time they expended in relation to the same and in the sale of said ranch to whomsoever might buy would amount to a large sum of money, and to which the defendants were justly entitled.

9th. The allegation and charge therein that neither the persons alleged in said bill other than said George Burnett prior to the incorporation of said complainant — since its incorporation have ever expected or intended to pay the said defendants or either of them for such services.

33 10th. The allegation and charge therein that the said complainant has no rights which antedate its existence; that the matters complained of and the alleged frauds attempted to be charged in said bill and as appears by said bill were, if committed at all, committed prior to the existence of the complainant.

11th. The allegation and charge therein that defendants purchased said ranch for one hundred thousand dollars less than its actual intrinsic or market value.

12th. The allegation and charge therein that in pursuance of their agreement and contract with said Burnett defendants received a moderate and reasonable compensation for their services rendered and no more; that they were entitled to be paid for their services, and, knowing that said Burnett had such knowledge and expected defendants so to do, received the same and now have the same and hold the said Burnett's portion for the benefit of the ones properly entitled thereto.

13th. The allegation and charge therein that, regardless from whom the said compensation was to be received—whether from Munson or the persons alleged in said bill—defendants were entitled to be paid for their services, and had the complainant or the persons alleged in said bill given these defendants to understand or be inferred that they or any of them were to pay the same the acts of the defendants would have been exactly the same.

14th. The allegation and charge therein that a reasonable compensation for defendants' services in the sale of said ranch was the sum of fifty thousand dollars.

15th. The allegation and charge therein that after the complainant had been organized it desired these defendants to subscribe to
its capital stock, and these defendants, upon the one and only
34 condition that the defendant, W. N. Ewing, should be made
the manager of said complainant for the period of five years thereafter, agreed with complainant to subscribe and did subscribe for $100,000.00 of its capital stock, and that, pursuant to said contract between them, the complainant appointed the said W. N. Ewing manager of its affairs and concerns for the period of five years, and that the same was all the agreement and all the connection or privacy ever had between the complainant and the defendants.

In all of which particulars complainant excepts to the answer of defendants as evasive, impertinent, irrelevant, immaterial, and constituting no defense to the bill of complaint, and prays that such irrelevant and impertinent matters be expunged, and that complainant be awarded costs in this behalf.

GEO. W. McCRARY,
ADAMS AND FIELD,
Solicitors for Complainant.

And afterwards, in vacation of said court, and on the 21st day of January, A. D. 1886, the following entry appears of record, to wit:

CEDAR VALLEY LAND AND CATTLE COMPANY
against
WILLIAM M. EWING *et al.*

This day comes John K. Cravens, special master, and files report on the exceptions of complainant to the answer of defendants for impertinence.

Said report is in the words and figures following:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
35 W. N. EWING and JAMES M. COBURN, Defendants.
No. 1043. In Equity.

To the honorable the judges of said court:

The undersigned, master in chancery, to whom was referred the matter of exceptions to the answer of the defendants, under order dated December 31st, 1885, certified copy hereto attached, respectfully reports that on the 14th day of January, 1886, the complainant, by Wash. Adams, Esq., of its solicitors, and the defendants, by Joseph G. Waters, Esqr., of its solicitors, appeared before me, at my office, in Kansas City, and the matter of exceptions embraced in said order of reference was taken up, argued by said solicitors, and submitted.

The bill charges that about December 1st, 1884, George Burnett and other named parties proposed to organize a corporation for purposes specified; that about Dec. 22nd, 1884, a part of the persons named, including Burnett, anticipating the corporate organization and assuming to act as its directors, requested and directed defendants to purchase for the corporation certain specified properties at the very lowest terms at which the same could be purchased; that the defendants accepted the trust; that on December 31st, 1884, defendants purchased the property contemplated, and on same day executed declaration of trust in favor of the corporation by name; that on the 7th January, 1885, the promoters named became a body corporate; that the promoters and the corporation transmitted to the defendants large sums of money to complete the purchase; that defendants have committed breaches of trust in respect to the purchase, the money transmitted, and misappropriated to their own use considerable portions therof; prays an accounting.

36 The answer pleads ignorance of the defendants as to relations of the parties named in the bill, each with the other, in relation to the promotion or formation of any corporation whatever; that they were at the times stated in the bill commission brokers selling properties like those described in the bill for a livelihood, and that at that time defendants had the property described in the bill on their books for sale; that defendants have never at any time been promoters of the complainant corporation, nor have they at any time had any agreement or understanding with any of the parties named other than George Burnett, but that Burnett, acting for himself alone, and without disclosing to the defendants that he had any associates interested or to be interested with him, and without any knowledge on the part of the defendants that there was any other person other than George Burnett embraced or included in the matter, pursuant to the express order, direction, and authority of said Burnett, with the full knowledge of Burnett, entered into the con-

tract set forth in the bill, and that the terms and form thereof and every condition therein *was* in obedience to the direction of said Burnett, with whom only defendants had to do, and that Burnett agreed with defendants that their pay in the matter of sale of the property described should come from the seller and not from the complainant, promoters, or any of them; that all the acts and doings of defendants in relation to the purchase of the property *was* pursuant to the orders and with the knowledge of Burnett.

The foregoing statement of the substance of the bill and answer does not cover all the facts set forth in either, but is sufficient to disclose the line upon which I have divided the exceptions taken to the answer.

The exceptions substantially cover all of the answer after
37 the general denial on page two, and the contention of the
complainant appears to be that the answer of the defendant must be confined strictly to a denial of such matters as they controvert and to such allegations as excuse them from the results which flow from the facts in the bill not controverted. I apprehend this rule is too narrow; it would force the defendants to a simple denial or to get into a bed prepared for them. A court of equity asks for a full presentation of all the facts in a suit as each party understands them, so far as the facts can by any possibility have influence in the formation of the decree. If matter in an answer relates to the subject of the controversy the court will not look to its materiality, for though not material as it may appear from the statements of the bill it may become so by the evidence. Nothing can be considered impertinent which may have any influence upon the result. To make matter impertinent the party complaining or excepting must show that it never can have any relation to the subject of the suit. Where the conduct of a party is complained of in a bill it is not impertinent to state in his answer the reasons for his conduct. It is not impertinent to plead what it is pertinent to prove.

Applying the rule above laid down to the exceptions in question, I sustain the first, sixth, seventh, tenth, and eleventh and overrule all other exceptions taken to the answer.

To which rulings the complain-t notified me that it excepts in so far as the exceptions are overruled, and the defendants notified me that *it* excepts in so far as the exceptions are sustained; but neither party has filed any written exception to my rulings.

The portions of the answer to which exceptions are sustained I have marked in parentheses. I respectfully ask for my services
38 in this matter an allowance of fifty dollars.

All of which is most respectfully submitted.

JOHN K. CRAVENS,
Master in Chancery.

January 20th, 1886.

Fifty dollars all'd.

A. KREKEL, *Judge.*

And on the 25th day of January the following entry appears of record:

CEDAR VALLEY LAND AND CATTLE CO.
against
WILLIAM N. EWING *et al.*

This day come complainants, by their solicitors, and file exceptions to the answer of defendants for insufficiency.

Said exceptions are as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
W. N. EWING and JAMES N. COBURN, Defendants.
In Equity.

Exceptions of Complainant to Defendants' Answer for Insufficiency.

Now comes complainant and excepts to the answer of defendants for the reason that the same is insufficient, in that it does not answer the bill of complainant in the following particulars, to wit:

I.

39 The allegation and charge in said bill to the effect that defendant Ewing had written certain letters to George Burnett and Duncan Stewart previous to the incorporation of complainant that defendants were willing, in connection with others, to subscribe to the capital stock of a corporation, the complainant, then about to be formed.

II.

The allegation and charge in said bill that on the 22nd day of December, 1884, said Duncan Stewart, George Burnett, Lord George Campbell, and G. D. Fisher, in the city of London, styling themselves as this complainant's directors and acting as this complainant's promoters, by cablegram, believing that defendants were willing to undertake and assume the trust for complainant, directed and requested them, the said defendants, to buy said ranch, land, and cattle from said Munson at the very lowest terms for complainant.

III.

The allegation in said bill that defendants accepted the trust mentioned in the preceding exception.

IV.

The charge in complainant's bill that on the 31st day of December, 1884, said defendants, in the name of W. N. Ewing, in pursuance of said trust, concluded negotiations with said Munson for said ranch and purchased the same from him for complainant.

V.

The charge in complainant's bill that said contract of sale and purchase from Munson, though made in the name of said Ewing, was in reality made for and in behalf of complainant, then in contemplation of corporate existence, and that the same was so understood and intended by defendants and all persons concerned and interested, and that the same should be adopted by complainant when incorporated and enure to its benefit.

40

VI.

The charge in said bill that defendants received the three different installments from the promoters of complainant and complainant, upon the trust aforesaid, in behalf of complainant, to wit, as agents or trustees of complainant, to pay the same to said Munson for complainant.

VII.

The allegation and charge in said bill that said Ewing, after said written contract was signed by said Munson and delivered to defendants, as in duty bound, declared in behalf of complainant the written declaration of trust copied in said bill and dated December 31st, 1884.

VIII.

The allegation and charge in said bill that defendants well knew that the first installment of money, to wit, the sum of $99,791.80, sent them to pay Munson on account of said purchase, had been raised for complainant for the purpose aforesaid, and that the same was received by defendants in trust and to be paid out by them for complainant.

IX.

The charge in said bill that prior to the 7th day of January, 1885, and at the time of receiving from the promoters of complainant the first installment of money to be paid for complainant to said Munson, that defendants then treated complainant as a corporation and acted toward it as such and acknowledged its corporate existence, and that said sum of money was held in trust for it and said contract was made for its benefit.

X.

The allegation and charge in said bill that complainant was, until the month of August, 1885, ignorant of the alleged fact that defendants had appropriated any part of the money sent them
41 to be paid to said Munson.

XI.

The allegation and charge in said bill that complainant had fully complied with and carried out the contract with Munson set forth in said bill and had paid the amount therein agreed to be paid to him for said ranch, cattle, &c.

XII.

The allegation and charge in said bill that complainant, relying upon defendants, until the month of August, 1885, believed and supposed that the whole amount of money sent by it and its promoters for it had been properly disbursed and paid to Munson.

XIII.

The allegation and charge in said bill that defendants instead of acting in the interests of complainant, as they were in duty bound to do, and purchasing said ranch and cattle and land for the lowest price, as directed in behalf of complainant and for their own advantage, they in the contract of purchase agreed to pay to said Munson for 75 per cent. of the bulls sold to complainant about $18,000.00 more than said Munson was willing to sell them at.

XIV.

The allegation and charge in said bill that at the time of making said contract with Munson defendants, in order to gain an advantage at the expense of complainant, secretly agreed with said Munson to take a commission on the sale of said property on the pretense of representing the interests of said Munson.

XV.

The allegation and charge in said bill that defendants, upon the payment of the first installment of $100,000.00 to said Munson, appropriated to their own use a large portion thereof, to
42 wit, the sum of about $10,000.00.

XVI.

The allegation and charge in said bill that from the moneys sent by complainants for the payment of the second installment to said Munson said defendants retained for their own use the sum of $15,000.00.

XVII.

The allegation and charge in said bill that from the third installment, consisting of moneys sent by complainant as aforesaid and entrusted by it to defendants to pay said Munson, said defendants appropriated a large portion, to wit, about $15,000.00.

XVIII.

The allegation and charge in said bill that while defendants were pretending to represent complainant in the transactions with said Munson they, in order to gain an advantage to themselves thereby and make a profit, retained a large part of one of the installments of money by complainant, viz., about the sum of $60,000.00, and in lieu thereof conveyed — the said Munson a building situated in the city of Kansas, on the south 30 feet of the east 90 feet of lot 179, block 18, Old Town, at a valuation of $75,000.00, subject to an incumbrance of $15,000.00, whereas in truth and fact said building, encumbered as aforesaid, was really worth less than $45,000.00.

XIX.

The allegation and charge in said bill that all of the acts of bad faith aforesaid, whereby said defendants retained said moneys and profits, were unknown to complainant until the month of August, 1885, and were purposely, carefully, and studiously concealed by defendants.

XX.

The allegation and charge in said bill that when complainant ascertained the facts hereinbefore stated it demanded in writing of defendants that they account for and pay over to complainant all the moneys and profits thus covinously and fraudulently appropriated and retained by them.

XXI.

The allegation and charge in said bill that in the accounts and
statements theretofore rendered by defendants concerning
43 the transactions aforesaid no mention was made of any of
the matters or things therein complained of, but the same
were kept secret and hidden by defendants from complainant.

XXII.

The allegation and charge in said bill that defendants did not act for said Munson nor as his agent in the matters aforesaid or transactions mentioned in said bill.

XXIII.

The allegation and charge in said bill that the sums received by defendants under pretense of commission from said Munson were in reality the moneys of complainant, as defendants well knew, and that the pretense of commission from Munson was a mere device and subterfuge, resorted to by defendants in order to *concede* and cover up their fraud and covin above set forth in said bill.

In all which particulars complainant excepts to the answer of said defendants as evasive, imperfect, and insufficient, and not to the best knowledge, remembrance, information, and belief of said defendants as to the particulars above set forth; wherefore complainant prays that the said defendants may be compelled to put in full and sufficient answer thereto.

GEO. W. McCRARY,
ADAMS AND FIELD,
Solicitors for Complainant.

And afterwards, to wit, on the 1st day of February, A. D. 1886, the following entry appears of record in said cause:

CEDAR VALLEY LAND AND CATTLE CO.
against
JAMES M. COBURN *et al.*

44 On motion of complainant it is ordered that the exceptions to defendants' answer for insufficiency be set for hearing on the rule day in March next, in accordance with equity rule 63. Said motion is in the words and figures as follows, to wit:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE CO., Limited,
vs.
COBURN and EWING.

Now comes the complainant in the above cause and asks that the exceptions for insufficiency of defendants' answer heretofore filed be set down for a hearing on the next rule day of this court before a judge thereof, and that an order be made on this day to that effect.

ADAMS AND FIELD,
Solicitors for Complainant.

And afterwards, to wit, in vacation of said court and on the 19th day of June, A. D. 1886, the following entry appears of record, to wit:

In the Circuit Court of the United States within and for the Western District of Missouri, Western Division.

CEDAR VALLEY LAND AND CATTLE CO., Limited,
v.
WILLIAM N. EWING *et al.*
1043. Bill.

J. M. COBURN *et al.*
v.
CEDAR VALLEY LAND AND CATTLE CO., Limited.
1069. Bill.

CEDAR VALLEY LAND AND CATTLE CO., Limited,
v.
J. M. COBURN *et al.*
1070. Cross-Bill.

45 COBURN AND EWING
v.
CEDAR VALLEY LAND AND CATTLE CO., Limited.
1072. Cross-Bill.

Now comes The Cedar Valley Land and Cattle Company, Limited, a party to all the above-mentioned suits, and petitions the court to enter an order or decree in each of said cases showing that the matters in controversy therein have all been settled and compromised by the parties and are decreed and adjudged to be finally settled, and ordering that all the said cases be dismissed, the plaintiff in each to pay costs therein, and that the sureties on the injunction bond given by this petitioner be discharged.

And in support of this application the petitioner files herewith true copies of the written correspondence between the parties, embodying their agreement of compromise, and on the hearing of this petition will produce the originals thereof; also affidavit of George Dixon Fisher.

THE CEDAR VALLEY LAND AND
CATTLE CO.,
By GEO. W. McCRARY AND
ADAMS AND FIELD, *Solicitors.*

Said copies of correspondence are as follows, to wit:

Received November 12, 1885.

Karnes and Waters will recommend any one of the following compromises:

1. C. & E. to be paid back the money for their stock, say $50,000.

C. & E. to pay back the sum of $40,000.

Ewing to resign the management.

The company to enter its appearance in a suit to be brought by C. & E. to determine the value of their services and commission in
purchase of property, leaving out all transactions between
46 C. & E. and W. B. M.

2. The company to allow C. & E. 25,000 as their commissions for the purchase of the ranch, C. & E. to pay balance of $40,000, company to pay back amount of stock, each party to pay costs made by themselves.

3. Arbitrate by three persons, one selected by each, they to choose a third, what their services shall be, and the company then to pay the amount set, C. & E. to pay $40,000 & company to pay amount of stock.

Either proposition to be finality as to all the matters embraced in the bill filed by the company *vs.* C. & E.

Response to the Proposition of Waters and Karnes, Attorneys for Coburn and Ewing.

Adams and Field and Geo. W. McCrary will recommend to their client, the Cedar Valley Land and Cattle Company, a settlement with Coburn and Ewing as follows:

1. C. & E. to be allowed for their stock what they have paid on it.
2. C. & E. to pay back to the company the sum of $40,000.
3. Ewing to surrender management.
4. This settlement to be a full and final adjustment of all the controversies between the parties and of all claims of either party against the other.
5. No delay of legal proceedings in consequence of these negotiations, unless by an agreement the controversies are ended.

This proposition involves the surrender of the company's claim for the profit on the sale of Delaware-street property, to which we think it entitled, and which will, we suppose, amount to about the sum of $15,000, as well as other claims set forth in its bill.

47 And it involves also the allowance for the stock of C. & E. of about $10,000 more than its present value.

These are therefore the most favorable terms we can recommend, and under no circumstances can we advise the payment of commissions to C. & E. or any waiver of the company's right to defend against any claim that they may make on this acccount.

Kansas City, Mo., *Dec.* 28, 1885.

Judge Geo. W. McCrary, att'y-at-law.

My Dear Sir: In the matter of controversy between the Cedar Valley Land and Cattle Company and Mess. Coburn and Ewing it must have been observed that I have not seemed quite in accord with those associated with me. I have always felt inclined to some amicable adjustment, and regretted when I was directed to terminate rather summarily the negotiations to that end undertaken a few weeks ago. I have now taken the liberty of addressing you this note entirely upon my own responsibility, and I am induced to do so by a statement made to me by Mr. Gage, a mutual friend of both parties, to the effect that he understood Mr. Fisher that the terms proposed by you in our former negotiation were still open for acceptance. If such be the case I say frankly to you that in my judgment the terms then proposed contain substantially the correct basis of settlement, and I would like again to move in the direction of ending all this interminable litigation. I do not wish to trespass on your valuable time, and hence I have not called to present these views in person, but if this letter receives a favorable response I will see my clients and at some time when agreeable to you will call at your office to canvass the matter more in detail. If it is thought best by you not to negotiate further I would be glad that no

48 mention be made of this letter.

With high regard, very truly, J. V. C. KARNES.

Kansas City, Mo., *December* 28, 1885.

J. V. C. Karnes, Esq., Kansas City.

My Dear Sir: Yours of this date received. Mr. Fisher is out of town and will not return until the last of the week. I think, however, he is still disposed to settle, and if you can bring your clients to agree to the terms proposed by us let me know, and as soon as he returns I will see him and advise you.

Yours truly, GEO. W. McCRARY.

P. S.—I will not mention the matter to any one until I hear from you further.

G. W. M.

KANSAS CITY, MO., *Dec.* 28, 1885.

Judge Geo. McCrary, city.

MY DEAR SIR: Upon the receipt of your communication of to-day I at once sought an interview with my clients. Maj. Ewing is out of the city, and I only saw Mr. Coburn, who thinks Maj. Ewing will agree to any arrangement that he may make. He has much to say of the company's injustice to them in seeking to appropriate without compensation the result of their labor and skill in the purchase of this property. He contends that Munson was
49 taken at a time when for several reasons he was very anxious
to sell, and that they drove an unusually good bargain with him. Of course, I have sought to impress upon him that the case must be tried squarely upon the law. I have brought myself to believe that there is not much probability of your recovering on account of the house and the bulls, but as to the commission of $40,000 I have frankly said that I believed the chances were against my clients. This amount represents the whole sum your company has lost, while it has received the benefit of valuable services at no expense whatever. Any settlement made must involve an entire withdrawal of the interests of Coburn and Ewing. They insist that their stock is worth a premium, while, on the other hand, Mr. Fisher claims that it has depreciated. I am aware that you have the impression that Burnett was not connected with this sale, but in this it is more than probable that you are in error, and Coburn and Ewing have in their possession the proportional part realized coming to Burnett, amounting to $16,800. All these phases of the case I have gone over carefully with Mr. Coburn, and he has become willing to settle in a way approximately as follows:

(1.) That the stock of Coburn and Ewing be taken at $50,000.

(2.) That Coburn and Ewing pay back to the company the $40,000 received from Munson.

(3.) That the company, with American securities, indemnify C. & E. against any claim of the representatives of Burnett as to the $16,800.

(4.) That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed.

(5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. As I understand, this is substantially your proposition
50 to us. In a conversation with you I think you stated that you
would favor the indemnity for the $16,800. I believe there is a controversy between Mr. Ewing and Mr. Fisher as to whether the company owes Ewing about a month's balance on salary. This, however, of course, can be settled by the books. If I have not made my proposition clear I will be glad to state it more fully, and upon Mr. Fisher's return I much hope a satisfactory adjustment can be made.

Yours truly, J. V. C. KARNES.

KANSAS CITY, MO., *January* 5, 1886.

Col. J. V. C. Karnes, Kansas City.

MY DEAR SIR: We were advised by the counsel of the Cedar Valley Land and Cattle Company in London that the company has no right either to purchase or provide for the cancellation of the stock now held by Coburn and Ewing. In view of this advice Mr. Fisher does not feel at liberty to conclude the settlement upon the basis of taking back the stock. If we could agree upon any settlement which would leave the stock in the hands of Coburn and Ewing or which would not require the company to take it Mr. Fisher would feel at liberty to act in the matter; but, as I assume that this cannot be accomplished, I have advised Mr. Fisher, who leaves for London in a few days, to lay the whole matter before the board and give us instructions which will, I hope, enable us to agree with you upon some disposition of the stock and upon a final satisfactory adjustment of the matters between the parties.

Yours truly, GEO. W. McCRARY.

51 KANSAS CITY, MO., *January* 8, 1886.

Judge Geo. W. McCrary, att'y-at-law.

DEAR SIR: Your note of the 5th inst. was duly received, stating that no further action could be taken in the matter of settling the dispute between the C. V. L. & C. Co. and Mess. Coburn & Ewing until Mr. Fisher had additional instructions from his company. I have delayed answering until I could confer with Mess. C. & E., which I have now done. They greatly regret the delay that will be necessar-y occasioned, as they hoped for a speedy termination of the controversy. I have urged upon them that they allow me to continue my efforts for an adjustment. This they have done, with the understanding that I request you to ask Mr. Fisher to report by cable at the earliest possible moment whether the proposition will be accepted. This is a matter involving so large an amount and requiring the taking of testimony at so many and such remote points that I assume that we are agreed as to the importance of determining this negotiation one way or another as soon as the same can be reasonably done.

Awaiting your further advice, I am, very truly,

J. V. C. KARNES.

KANSAS CITY, MO., *January* 11*th*, 1886.

J. V. C. Karnes, Esq.

DEAR SIR: I have arranged with Mr. Fisher to cable me instructions from London as to compromise of the controversy between Coburn & Ewing and the C. V. L. & C. Company. I will advise you promptly when instructions are received.

Very truly yours, GEO. W. McCRARY.

52 KANSAS CITY, MO., *Jan'y* 26, 1886.

Judge Geo. McCrary, city.

DEAR SIR: Mess. Coburn —— have 2,000 shares in the C. V. L. & C. Co., £5 each, paid, amounting to about $48,800. They will settle the controversy with the company—

1. By returning the $40,000 commission and the company's taking their stock at the actual amount paid by them; or,

2. They will turn over to the company 1,600 shares and retain 400.

3. In any event C. & E. are to be protected against any claim by Burnett's estate, either by a release or indemnity.

4. Mess. C. & E. agree not to buy up or otherwise molest any of the ranch privileges now enjoyed by the company.

5. This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon, but not enter into this arrangement in any way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement.

6. The balance of salary as compensation to be paid to Mr. Ewing.

Very truly, KARNES AND ESS.

KANSAS CITY, MO., *February* 2, '86.

Col. J. V. C. Karnes, Kansas City.

MY DEAR SIR: I enclose herewith a letter just received from Mr. Fisher from New York, which explains itself. Mr. F. carries with
him to London the several propositions of settlement which
53 have been under discussion. Will you kindly advise me
what response Coburn & Ewing have to make to the terms
suggested in this letter? If possible I should like to be advised in time to write Mr. Fisher to-morrow, as requested.

Please return Mr. Fisher's letter.

Yours very truly, GEO. W. McCRARY.

(Inclosure.)

NEW YORK, *29th Jan'y*, 1886.

Geo. W. McCrary.

MY DEAR SIR: As I wired you yesterday, I am unfortunately here till to-morrow, at 2 p. m., in consequence of the steamer I intended sailing with yesterday being disabled. I am sorry at this, as I am anxious to get to London to consult with my codirectors. I have been thinking a good deal over the best way to arrange a compromise with C. & E., but in every shape I take it it is always saddled with the difficulty of dealing with their stock.

No one, of course, would be fool enough to take their shares at par when it is so generally known, and by none better than C. & E. themselves, that the value of all cattle shares are not within 20 per cent. of what they were, and as the company itself can neither buy nor cancel it is most perplexing. The following is a proposition that has occurred to me that C. & E. might submit to the board: C. & E. agree to pay the Co. the $5,000 commission, with interest thereon at the rate of 8 per cent. per annum for the time they have had it; C. & E. to retain their stock in company, the directors getting for them an advance on it for $40,000, at the rate of interest of 10 per cent. per annum, said advance to go to liquidate the debt to the company, C. & E., besides, paying the company's expense in connection with this litigation.

54 This arrangement would enable C. & E. to hold their stock, which they appear to value so highly, until such time as they could sell it at par, or possibly, in two years, at a premium, and at the same time refund the $40,000. The company would in this case not commence proceedings for damages caused by turning back the cattle. If you think well of this project you can see Karnes about it, and if C. & E. are disposed to make the above proposition, cable word "consent" on 8th February, the day I expect to get to London. Frankly, I must say this is a more favorable settlement than I would give them, as I am satisfied there is more in the real estate than $15,000, but under the circumstances might be accepted by the board.

Faithfully, GEO. D. FISHER.

Of course, if there is no cablegram, I will understand they will not make this proposition; in any case, write not later than Wednesday.

KANSAS CITY, MO., *Feb'y* 2, 1886.

Mess. Geo. W. McCrary, city.

DEAR SIR: I am just in receipt of your letter of to-day, including a letter from Mr. Fisher, from N. Y., which I herewith return to you. You have heretofore seen fit to express your appreciation of what I had done and was doing to get this controversy settled, and hence I need not restate my endeavors in the matter. I am only sorry to see Mr. Fisher taking the position indicated by his letter. I am now convinced that Mr. Gage was correct in his opinion 55 that he, F., was unfavorable to any settlement. The terms proposed in his letter I have not submitted nor will I submit to my clients. I have been satisfied from the beginning and am still satisfied, and have so stated to Mess. C. & E., that they were liable in law for the return of the $40,000, but I do not believe they are liable any further. This they ought to repay. On the other hand, this company has received the benefits of their labor without any expense. There ought to be some recognition of the equities of the case. On such a basis I have tried to have an adjustment made; but if it is the determination of Mr. Fisher to drive these men to the wall, then there is no alternative left but to fight. I shall still hope, however, that through the co-operation of yourself and Mr. Gage that a fair and just settlement may be made, and that the damage to the interests of all concerned, to which Mr. Fisher's rashness will lead, may be avoided. As Mr. Fisher mentioned my name in his letter, I would be glad to have him furnished a copy of this.

Very truly, J. V. C. KARNES.

Cablegram.

From London. Kansas City.

Ewing's proposals declined. Letter posted to-day, enclosing complete answer to cross-bill and conveying the only terms which will be accepted. Inform Ewing.

Kansas City, Mo., *February* 24, 1886.

Col. J. V. C. Karnes.

My Dear Sir: I enclose copy of letter, just received from the secretary of the Cedar Valley Land and Cattle Company, submitting the only terms upon which the company will settle with Coburn and Ewing. The sum demanded is nominally larger than that
56 offered by you, but, as it is proposed to receive payment in cattle and the stock of the company now held by C. & E. at par, I am in hopes your clients will consider it better to accept than to continue the litigation.

If this proposition is accepted please advise me before March 4th.

Yours truly, GEO. W. McCRARY.

Kansas City, Mo., *Feb.* 27, 1886.

Judge Geo. W. McCrary, city.

Dear Sir: On February 4th, 1886, you handed to J. V. C. Karnes, Esq., one of our counsel, a copy of a letter which you had just received from the secretary of the Cedar Valley Land and Cattle Company, which is as follows:

The Cedar Valley Land and Cattle Company, Limited,
Morgate Street Chambers, London, E. C., *Feb.* 11, 1886.

Dear Sir: The board have had under their very careful consideration Mess. Karnes & Ess' letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn and Ewing for the settlement of the claims made by the Cedar Valley Land and Cattle Company upon them.

I am instructed to inform you that neither of these propositions is acceptable, and that the action against Mess. Coburn and Ewing must proceed. With that view the answer to Mess. Coburn and Ewing's cross-bill has been forwarded to Mess. Adams and Field along with a letter from the solicitors of the company.

57 The company being liable in a large sum of costs, which will not be recovered from Mess. Coburn and Ewing, the only terms upon which the board can agree to compromise the claim of the company are as follows:

1. That the amount payable to the company by Mess. Coburn and Ewing be £10,000, the amount paid by them for the 2,000 shares now standing in their names.

2. That this amount, £4,000, shall be paid in cash, or in lieu thereof that the cattle of the L. & W. herd now upon the Cedar Valley ranch shall be accepted as cash, when counted over this spring, upon a valuation to be made by two valuers—one chosen by Coburn

and Ewing and one by the company—the valuers appointing referee.

3. That the balance then remaining due to the company wil be discharged by the transfer to such person or persons as ma be named by the board of a sufficient number of Mess. Coburn an Ewing's shares on the basis of a par value, the shares then remaining in the hands of Coburn and Ewing to be held by them for period of not less than two years.

4. Mess. Coburn and Ewing to give security that they will not bu up or otherwise molest any of the range privileges now enjoyed b the company.

5. The company agree to protect Coburn and Ewing against an claim from the executors or the partner of the late Geo. Burnett.

When the board consider (1) that the issue has practically bee
decided against Mess. Coburn and Ewing by the same judge befor
whom the case will ultimately be tried; (2) that Mess. Coburn an
Ewing have received from Mr. Munson the sum of $75,000 for
property which, in the written estimate of six of the eminent valuer
in Kansas City, is worth from $45,000 to $50,000; (3) the almost
insuperable difficulty which the board will have in plac-
58 ing any of the shares transferred by Mess. Coburn and Ewin
in consequence of the non-payment, a dividend resulting fro
Mr. Ewing's vindicative or il-judged action in ordering the beeve
back to the ranch, and (4) the interest upon the amount of commis-
sion obtained in various ways from Mr. Munson from the period o
its receipt up to the present date, which, we are advised, would b
recoverable from them by an action at law, the board is of the opin-
ion that the foregoing offer is more favorable to Mess. Coburn &
Ewing than the latter had any right to expect. The board, how-
ever, is induced to offer these easier terms with the object of settlin
the matter before the general meeting of the 4th of March. It i
therefore to be distinctly understood that this proposal only remain
open until the 3rd of March, and that failing the receipt on or be-
fore that date of a telegram announcing that Mess. Coburn and Ewin
have signed an agreement embodying the above terms, the order no
made by the board is withdrawn on that day. It will suit the com-
pany infinitely better to receive the amount of their claim in cash,
as would be the case when a judgment has been recovered in thei
favor, than to have to deal with any large number of shares trans-
ferred by Mess. Coburn and Ewing. It is to be understood that th
offer is to be made without prejudice to any claim for damages which
the board may have against the executors or the partner of the late
George Burnett.

The directors desire me to add that in the event of the foregoing offer being refused they will feel it their duty in the interests of the shareholders to claim full compensation for damages which the company have sustained under various heads, which are clearly attributable to the account of Mess. Coburn & Ewing.

I am, dear sir, yours truly,

59 JAMES E. WEBB, *Sec'y.*

Geo. W. McCrary, Kansas City, Mo., U. S. A.

And on February 26th, 1886, you sent to Mr. Karnes the original letter you had on that day received from the same party, and which was as follows:

THE CEDAR VALLEY LAND & CATTLE
COMPANY, LIMITED, MORGATE STREET CHAMBERS,
LONDON, E. C., 12*th Feb.*, 1886.

DEAR SIR: In reading over the letter which I had the pleasure to address to you yesterday I noticed two points in reference to which I would like to make some observations.

The sum of £10,000 is fixed as the damages to be paid by Mess. Coburn and Ewing, and it is added that this sum was the amount paid by Mess. Coburn and Ewing for their shares. Seeing that there is no connection whatever between the claim for damages and the payment of shares, it is advisable that the words "the amount paid by them for the 2,000 shares now standing in their names" be eliminated from the letter, if you think advisable to read it or give a copy of it to Mess. Coburn and Ewing.

The words "vindic*a*tive or il-judged," on page 3 of the letter, should also be eliminated, as Mr. Ewing, in his letter — 24th October last, stat*ing* that he was acting for the best interests of the stockholders in turning back the beeves. These words are unnecessary, although the directors could not possibly approve a step which precluded the possibility of paying a dividend, the non-payment of
60 which would have, as had been fully explained to Mr. Ewing,
such an injurious effect on an English company. If Mess. Coburn and Ewing should prefer to deliver the cattle of the L. & W. herd, now on the Cedar Valley ranch, the transfer of 12,00– would be accepted by the board at present, leaving the balance of £4,000 to stand over in the meantime.

If the valuation of the L. W. herd shall eventually fall short of that sum, the balance of such valuation to be made up to the company by the transfer of an equivalent number of shares in the company on the basis of a par value, the boarding of the above cattle to be paid for at the time of transfer at the agreed-on rate, $1.50 cents per head.

The board is quite ready to agree to Mr. Ewing's stipulation that he shall be paid his salary during such time as he remained in the service of the company, whatever amount may be found due to him upon a proper adjustment of accounts.

Will you kindly bear these points in mind in dealing with the other side.

I am, dear sir, yours truly,

JAMES E. WEBB, *Sec'y.*

Geo. W. McCrary, Esq., Kansas City, Mo., U. S. A.

Both of these communications, together with your two letters forwarding them to Mr. Karnes, he has placed in our hands. In connection with both our counsel we have fully considered the terms of this proposition. We wish to state emphatically that we re-

gard the proposition as unjust and oppressive, but we have so
61 much involved in this litigation that we agree to accept the
terms of the offer as made. The £4,000 will be arranged for with the L. W. cattle, as suggested in the letter of February 12th, and the 1,200 shares of stock therein mentioned we herewith hand you, to be transferred to such parties as may be named. We have only two certificates of two thousand shares each, and we deliver both to you, and the company can return us a certificate for 800 shares. The bond called for by the fourth section of the proposition in the letter of February 11th we will give at any time. It will now soon be the season when the L. W. cattle can be counted, and we will be ready at once to name valuers. Now that a settlement has been effected, we hope there will be no delay in carrying it out in all respects as agreed upon.

We desire to express to you our thanks for the uniform courtesy with which you have treated us throughout this unpleasant matter.

We are, dear sir, very truly,

W. H EWING.
JAMES M. COBURN.
COBURN & EWING.

KANSAS CITY, *February* 27, 1886.

Mess. Coburn and Ewing, Kansas City.

GENTLEMEN: Mr. Karnes has handed me your letter accepting the terms of compromise proposed by the Cedar Valley Land and Cattle Company, and has also placed in my hands the certificates for the two thousand shares of stock held by you in the company. I will wire Mr. Webb, secretary of the company, that you have accepted in writing the company's proposition, and have written him
requesting that the company take immediate steps to choose a
62 valuer and proceed with as little delay as possible to close up
the matter of the compromise. Of course, it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties.

The matter of costs and the balance due you on salary can easily be adjusted hereafter. Col. Karnes and I agree that each party pays its own costs.

Yours truly,

GEO. W. McCRARY.

KANSAS CITY, MO., *March* 18, 1886.

Messrs. Karnes and Ess, Kansas City, Mo.

GENTLEMEN: I am just in receipt of a letter from James E. Webb, secretary of the Cedar Valley Land and Cattle Company, Limited, of date March 6th, of which I enclose you a copy. Mr. Webb sends me with this letter an assignment, to be executed by Messrs. Coburn and Ewing, transferring to him 1,200 shares of their stock in said company. When Mr. Webb wrote this letter he had not received my communication, written on the 27th of February, informing him that Messrs. Coburn and Ewing had placed in my hands their certificates for the whole 2,000 shares, and had requested that the company would issue to them a new certificate for 800 shares. That letter would reach London about the 7th inst., and an answer may be expected very soon. Probably it would be better to take no further action until it is received.

Yours very truly, GEO. W. McCRARY.

The Cedar Valley Land and Cattle Company, Limited, Morgate St. Chambers (30*a* Morgate street).

LONDON, E. C., 6 *March*, 1886.

63 DEAR SIR: I have to acknowledge the receipt, on the 27th February, of your cablegram of that date, reading:

"Terms proposed accepted by Coburn & Ewing to-day in writing."

That telegram was laid before the board at their meeting on the 3rd inst., and I am directed to inform you that they are glad that a settlement has been arrived at upon terms which they believe will be found upon consideration to be satisfactory to all parties. The board is prepared to find that all the obligations entered into by Mess. Coburn and Ewing will be faithfully and honorably carried out by these gentlemen, and they trust that amicable relations will be resumed and will continue uninterruptedly for the future.

With the view to the carrying out of the provisions of the agreement with Mess. Coburn & Ewing, I now enclose a transfer of 1,200 shares, to be executed in my favor, and the company undertake that if the value of the L. W. herd shall exceed the sum of £4,000 the difference shall be adjusted by the retransfer to Mess. Coburn and Ewing of shares to an equivalent value.

Awaiting confirmation by letter of your cablegram of the 27th,

Yours truly, THOMAS E. WEBB, *Sec'y.*

Geo. W. McCrary, Esq., K. C., Mo., U. S. A.

KANSAS CITY, MO., *March* 27, 1886.

J. V. C. Karnes, Esq., Kansas City.

DEAR SIR: I am now advised that the Cedar Valley Land and Cattle Company cannot issue the new certificates for eight hun-
64 dred shares of stock to Coburn and Ewing, as per terms of compromise, until the latter have assigned the twelve hundred shares. They therefore wish Mess. C. & E. to execute the inclosed assignment, to be sent by me to London. This done, they will immediately execute and send over the new certificates for eight hundred shares.

Please have the assignment executed and return to me at the earliest time practicable, as I wish to forward it without delay.

Yours truly, GEO. W. McCRARY.

(Inclosure.)

And the affidavit of Geo. D. Fisher in support of petition for decree, filed on the 19th day of June, 1886, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Missouri, Western Division, } *ss:*

GEO. DIXON FISHER, being duly sworn, on oath deposes and says that he is agent and attorney-in-fact of the Cedar Valley Land and Cattle Company, Limited, and as such has for some time been engaged in negotiations for the settlement and compromise of the pending litigation between that company and Messrs. Coburn and Ewing in the circuit court of the United States, in the above-mentioned district, and that on or about the 29th day of April, 1886, this affiant called upon J. M. Coburn, a member of the firm of Coburn and Ewing, and submitted to him the form of a bond to be given by said Coburn and Ewing in pursuance of the terms of the compromise, to bind said firm not to buy up or otherwise molest any of the range privileges of said company. The form of a bond had been
drawn by George W. McCrary and printed with a typewriter,
65 but as drawn was not satisfactory, and a change therein had
been made in pencil by said McCrary by striking out the
words "as part and parcel of the," in the second line, and inserting in place thereof "in accordance with the terms of our letter of date February 27th, 1886, accepting terms of compromise." In this form the paper was handed to Mr. Coburn, who added the following words, which now appear upon the paper in his own handwriting: "Of all pending litigation." The first sentence of said bond was therefore amended by Mr. Coburn so as to read as follows: "That for a good and valuable consideration and in accordance with the terms of our letter of date February 27th, 1886, accepting terms of compromise of all pending litigation between us and the Cedar Valley Land and Cattle Company, Limited," &c. The original paper submitted to Mr. Coburn, with the amendment thereto in his own handwriting, is herewith filed, marked "Exhibit A," and made part of this affidavit.

Affiant further states that he is a member of the board of directors of the Cedar Valley Land and Cattle Company, and was present in said board when the proposition of compromise which has since been accepted by Coburn and Ewing was discussed and agreed upon, and the secretary ordered to put the same in form; and affiant further declares that it was understood and intended by said board and by all the members thereof that the same should be a full and final settlement of all pending litigation between the parties.

Further affiant saith not.

GEORGE DIXON FISHER.

Subscribed and sworn to before me by George Dixon Fisher this 19th day of June, 1886. My commission expires April 24th, 1890.

[SEAL.] FRED. P. BARNETT,
Notary Public, Jackson Co., Mo.

66 "EXHIBIT A."

Know all men by these presents that for a good and valuable consideration and _as part and parcel of the_* [in accordance with the terms of our letter of date Feb'y 27th, 1886, accepting terms of compromise (of all pending litigation)] compromise between us and the Cedar Valley Land and Cattle Company, Limited, we, the undersigned, James M. Coburn and William N. Ewing, partners composing the firm of Coburn & Ewing, do hereby agree and bind ourselves not to buy up or otherwise molest any of the range privileges now enjoyed by the said Cedar Valley Land and Cattle Company, Limited, in the counties of Randall and Deaf Smith, in the State of Texas.

In witness whereof we hereunto set our names this 26th day of April, 1886.

—— ——.
—— ——.
—— ——.

(CLERK'S MEMO.—The portion of the above-copied paper-writing included in brackets is interlined in pencil in the original on file in my office, and that portion of the copy through which a line is passed is similarly lined in the original.)

67 And on the 22nd day of June, A. D. 1886, the following affidavit of J. V. C. Karnes was filed:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

COBURN _et al._
_vs._
CEDAR VALLEY LAND AND CATTLE COMPANY, Limited. } Bill and Cross-Bill.

CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
_vs._
COBURN _et al._ } Bill and Cross-Bill.

J. V. C. KARNES, being duly sworn, upon his oath says that he was one of the solicitors for Coburn and Ewing in the above causes, and that the Cedar Valley Land and Cattle Company was represented by Hon. George W. McCrary and Mess. Adams and Field; and he says that after the correspondence of February 27th, 1886, R. H. Field brought to this office a statement, prepared by Judge McCrary, to the effect that the settlement as agreed on of that date was to be in full of all claims or demand between the respective parties in such litigation. Affiant says that he has not a copy of the paper produced by Mr. Field, but states the contents of it from recollection.

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*A line is drawn through the words printed in _italics_.

He says that he then distincly told Mr. Field that such paper would not be signed, but that his clients, Mess. Coburn and Ewing, had settled their matters with the Cedar Valley Land and Cattle Company on the propositions of February 11th; and 12th, 1886, and the unconditional acceptance of these propositions that day given by said Coburn & Ewing, and that under
68 no circumstances would this settlement be supplemented
by any further agreement. Affiant says that he was present with Mess. Coburn & Ewing and Jos. G. Waters, Esq., one of their solicitors, when these letters of February 11th and 12th were considered, and it was then understood and agreed that the propositions hitherto made had been rejected, and that the company offered these terms in these letters of February 11th & 12th as the ultimatum, and while it was desired in many respects to modify these harsh terms, it was agreed that to avoid any misunderstanding that the two letters be copied into a letter of acceptance, and that the terms be unconditionally accepted, and this was done; and affiant says that it was then distinctly stated by both Coburn and Ewing that these terms would be accepted only just in the way they were proposed and to cover nothing more; and affiant says that he and his associate counsel, Jos. G. Waters, prepared the letter of acceptance with that understanding. Affiant further says that in every letter and paper that has since been prepared that, so far as his knowledge extends, it has uniformly been with the understanding that the settlement of February 27th spoke for itself in the unconditional acceptance of the letters of February 11th and 12th, and that nothing was to be added thereto or subtracted therefrom.

J. V. C. KARNES.

Subscribed and sworn to before me, in Kansas City, Jackson county, Missouri, on this 22nd day of June, 1886. My commission will expire on the 22nd day of August, 1888.

[SEAL.] HENRY M. STONESTREET,
Notary Public, Jackson Co., Mo.

And on the 19th day of July, A. D. 1886, the following entry appears of record, to wit:

CEDAR VALLEY LAND AND CATTLE CO.
against
WILLIAM N. EWING *et al.*

This day a decree is ordered for complainant herein.

69 The order for a decree is in the words and figures following, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

COBURN *et al.*
vs.
THE CEDAR VALLEY LAND — CATTLE COMPANY, Limited. } Bill and Cross-Bill.

CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
vs.
COBURN *et al.* } Bill and Cross-Bill.

There have been two actions pending between these parties, in each of which both bill and cross-bill were filed. While thus pending, negotiations for settlement were entered into, which have resulted in a settlement, and the question now presented is the extent of that settlement.

After several propositions had been made by both parties, on the 27th of February the cattle company sent to Coburn and Ewing a letter, in which all propositions of theirs were declined and in which it was stated that "the only terms upon which the board can agree to compromise the claim of the company are as follows." This proposition was unconditionally accepted and its terms have been complied with by Coburn and Ewing. Now they insist that all that was settled was the claim of the company as presented in its pleadings, while their claims remain open and undisposed of. The company, on the other hand, insists that all the matters in controversy, including all the claims of both parties presented in these two
70 actions, were included in the settlement and are disposed of by the same.

I think that the company is right, and for these reasons:

First. Wherever parties are in litigation, having antagonistic claims, and a settlement is proposed and accepted it will be presumed that all matters in controversy in that litigation are included within the settlement unless the contrary clearly appears.

Second. It is perfectly obvious that the cattle company intended by its proposition to cover all the claims in controversy. It is true in the letter it says "the claim of the company," and in a narrow and technical sense that undoubtedly means simply its cause of action and would not embrace any distinct cause of action in behalf of the adverse party; but it is not a strained or unnatural use of language to construe it as applicable to the amount which the company claimed as the balance due after the adjustment and settlement of the respective claims of both parties. That such was the intent of the company is obvious from a preceding paragraph of that letter, in which the company uses this language: "The board have had under their very careful consideration Mess. Karnes & Ess' letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn and Ewing for the settlement of the claims made by the Cedar Valley Land and Cattle Company upon them."

In this is seen it speaks of offers made for settlement of the claims of the company—claims made by the company upon Coburn and Ewing. Turning to the letter referred to, we find that it was in terms a proposition for settlement of the entire controversy and including the claims of both parties. Thus, in its letter proposing this settlement, the company placed an unmistakable interpretation upon the expression "claim of the company."

71 Further, immediately upon the receipt of the letter accepting this proposition counsel for the company wrote a letter, which was received by Coburn and Ewing, in which he stated: "Of course, it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties;" so not only is the intent of the company clear, but it is also clear that Coburn and Ewing had full notice of that intent. Now, a contract—and this settlement is nothing but a contract—implies the agreement of two minds as to certain matters. What the company intended is clear, and that Coburn and Ewing had knowledge of that intent is equally clear. Of course, if they proceeded with the settlement with notice of what the company meant by the terms used they accepted the contract upon that basis.

Further, on the 29th of April, after the acceptance of this proposition of settlement, a bond was presented to Mr. Coburn which contained this language: "In accordance with our letter of date February 27th, 1886, accepting terms of compromise between us." Not satisfied with this language, Mr. Coburn in his own handwriting interlined these words after the word compromise, "of all pending litigation," which clearly shows that he understood that the settlement covered all the claims in controversy.

Finally and chiefly, these actions were pending in a court of equity, and such a court will see that good faith and fair dealing are observed by both parties. After this proposition had been made and accepted and before anything had been done except handing to counsel some certificates of stock, Coburn and Ewing were clearly notified of what the company intended by this proposition. Much remained to be done. Cattle were to be valued, counted, and delivered. It was an easy thing to hand back the certificates of stock. If they were unwilling to accept the settlement

72 when informed of what the company understood and intended by the proposition, it was their duty to say: We have misunderstood the scope of your proposition. If you mean all that you now say, we did not accept it. We have never come to any agreement. Instead of that, after full notice they go on and comply with all the terms of the proposition. It is too late for them now to say: We did not suppose that the proposition meant all that the company now claims. We thought it meant only a settlement of half the case, and insist upon the right to prosecute the other half.

I think the parties are entitled to a decree reciting that, upon the evidence presented, the court finds that there has been a full settlement of all the matters in controversy, and ordering that the several bills and cross-bills be dismissed, each party paying his own costs.

And afterwards, to wit, at the said May term, 1886, and on the 2nd day of August, A. D. 1886, the following entry appears of record, to wit:

THE CEDAR VALLEY LAND AND CATTLE CO.
against
WILLIAM N. EWING *et al.*

The following decree, filed July 24th last, was this day ordered to be recorded:

In the Circuit Court of the United States, Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
v.
WILLIAM N. EWING and JAMES M. COBURN.
1043.
Original Bill.

This case came on to be heard upon the petition of the said complainant for final decree settling and adjudicating all the issues herein, George W. McCrary and Adams & Field appearing for complainant and J. V. C. Karnes and Joseph G. Waters appearing for respondents; and the court, having heard the evidence
73 and the argument of counsel, sustains said petition, and it is
therefore ordered, adjudged, and decreed that there has been, by the agreement of the parties, a full compromise and settlement of all the matters in controversy in this case; and it is ordered that in pursuance of the agreement of the parties that the bill be dismissed at the cost of the complainant, to be taxed.

DAVID J. BREWER,
Circuit Judge.

And now come defendants, by their solicitors, and file application for a rehearing and a stipulation of parties setting the same for hearing.

Said application for a rehearing is in words and figures as follows, to wit:

In the Circuit Court of the United States, Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE CO., Limited, Pl'ff,
vs.
JAMES M. COBURN *et al.*, Def'ts.

James M. Coburn and William N. Ewing ask the court to set aside and vacate the decree entered in the above-entitled cause and grant them a rehearing for the following reasons:

1. The evidence on which this decree was based consists entirely of correspondence between counsel and affidavits, and it nowhere

appears that any form of entry was ever agreed upon or ever spoken of, other than that the bills and cross-bills should be dismissed, each party paying his own costs. The settlement made was wholly outside of the court and was not pleaded, and the court has no jurisdiction to supplement the agreement of the parties by decreeing a final settlement.

2. The court overlooked the testimony showing that the counsel
for the Cedar Valley Land and Cattle Company, before writ-
74 ing the letter to Coburn and Ewing, in which he stated "of
course it is understood that the settlement embraces all the
matters involved in the pending litigation in the several suits between the parties," had written a paper embodying the same idea, and had submitted the same to the counsel for Coburn and Ewing, who had peremptorily refused to sign it, and the counsel for the company, knowing this refusal, did not offer to return the stock and terminate the arrangement, but held the stock, and in a letter to Coburn and Ewing assumed a state of facts to exist which he ought to have known did not exist. In overlooking this previous correspondence the court committed error.

3. The court further erred in reaching the conclusion that the details of the settlement were carried out by Coburn and Ewing without disclosing their understanding that this was not intended as a full settlement. The evidence will show that at every step the counsel for the company had full knowledge that this claim would be made, and every word was excluded from the receipts and other papers passed between the parties which could in any way be construed into a final settlement of all matters in dispute. These receipts and other papers were not in evidence, but as it has been assumed that the company completed the arrangement on the belief that it was in full, we would ask to furnish copies of such papers and full affidavits covering these points.

4. The court erred in concluding there was a lack of "good faith and fair dealing" on the part of Coburn & Ewing in making said settlement. A proposition was made by the company and accepted by Coburn and Ewing. In less than an hour afterward a paper was prepared by counsel for the company engrafting upon
the settlement as made additional terms, reciting that this was
75 in full of all matters in dispute. This was promptly declined
by counsel for Coburn and Ewing. The stock could have
then been returned, but it was retained, and an effort made again to have Coburn & Ewing committed to a full settlement by the letter which was written. In the progress of the settlement the forms for receipts were carefully prepared, so as to exclude the idea that it was a full settlement. The full evidence will disclose the fact that this company has carefully sought from the beginning to recover the last cent possible from Coburn and Ewing, and at the same time has been unwilling to have the claim made by Coburn & Ewing judicially determined. To refute this imputation of unfair dealing your petitioners would ask that they be permitted to offer in evidence the papers as originally prepared for carrying out the details of the settlement and the changes in them insisted upon by Coburn & Ewing

and allowed by said company, showing that at all times from the acceptance of the proposition the company had full knowledge of the understanding of Coburn and Ewing and what they would insist upon, and that "good faith and fair dealing" would have required the company to have then repudiated the arrangement, instead of taking to itself all the benefits arising therefrom.

5. Full and complete evidence will show that the interlineation made by J. M. Coburn in bond has been wholly misunderstood. This bond was never used, and this change was made at a time when it was sought to agree upon these forms for carrying out the details, and in using this expression, "pending litigation," reference was had solely to claim made by the company, and when subsequently understood that it might be construed to cover both bills and cross-bills this expression was not used and nowhere appears in the
76 papers so used in settlement; all of which can be shown by a full statement of all the evidence bearing upon this point.

6. The evidence discloses that this company has had the services of Coburn and Ewing without any compensation whatever. This is no new claim made by Coburn and Ewing, but has been insisted upon at every step. The court has only been put in possession of a portion of the facts. The opinion filed shows the mistakes into which the court has been led. We ask that the case be reheard, and (1) that this application for a decree be denied, and that the parties be left to the agreement which they have made, and that the bills be dismissed.

(2.) Or that the entire evidence bearing on this settlement be heard.

J. G. WATERS,
KARNES & KRAUTHOFF,
For Coburn & Ewing.

Said stipulation of parties is in words and figures as follows:

In cases number 1043, 1069, 1070, & 1072 by agreement the motions for rehearing to be taken up and disposed of next rule day.

KARNES & WATERS,
For C. & E.
R. H. FIELD, *For Cattle Co.*

On the 11th day of September, 1886, the following notice was filed:

To Judge George W. McCrary:

You are hereby notified that on the 17th day of September, 1886, in the city of Leavenworth, Kansas, before Judge Brewer, we will call up the petition to set aside the decrees in the several cases
77 pending between Coburn & Ewing and the Cedar Valley Land and Cattle Company, Limited, in the circuit court of the United States for the western division of the western district of Missouri.

J. G. WATERS, AND
KARNES & KRAUTHOFF,
Attorneys for Coburn & Ewing.

Kansas City, Mo., Sept. 11, '86.

I hereby accept service of above notice.

GEO. W. McCRARY,
For Cedar Valley Land and Cattle Company, Limited.

And at the October term, 1886, of said court, and on the 8th day of November, A. D. 1886, an opinion of the court was filed in words and figures as follows, to wit:

In the Circuit Court of the United States, Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
vs.
JAMES M. COBURN *et al.*

Opinion.

BREWER, *C. J.:*

Coburn and Ewing petition for a rehearing.

They object that the decree as entered shows a final settlement of all matters in controversy and dismisses the bills and cross-bills, when in fact there was no final settlement and when under the pleadings no such question was in issue or could be determined.

The facts are these: After bills and cross-bills had been filed some compromise was effected; of that there is no dispute.

The Cedar Valley Company filed a petition alleging that
78 all claims in dispute had been settled and asking a decree
accordingly.

A hearing was had; affidavits and other testimony presented without objection. Both parties appeared and argued the question. No objection was made to the form of the proceeding, the only objections being that in fact the settlement was only partial instead of total, and that the court had no right to enquire into the matter, but could only dismiss the bills and cross-bills. Now, it is insisted that if anything had transpired since the filing of the original bills and cross-bills changing or affecting the issues such new matter should have been presented by supplemental bill. I think counsel are right, and that such is the true practice; but that is a mere matter of form. All the facts were presented as fully and as clearly as though stated in a supplemental bill. No objection on account of form was suggested. Will a party be permitted to test the judgment of the court on the substance of the controversy and upon defeat, then for the first time raise a mere question of form? Nothing can be plainer. When cases of an equitable nature are removed from a State court seldom is the plaintiff's pleading in the full and precise form of a bill in equity. If parties insist, repleading is ordered. But, if not, and all the facts are stated, will the court, after decree, set it aside simply because the pleading does not contain all the formalities of a bill? Such a proceeding would give a bitter irony to the appellation of the court as a court of equity. So here it is not pretended that all the facts were not stated, but only that they were not presented through the formalities of a supplemental bill. Coburn and Ewing were cut off from no right; were not prevented from making a full defense. They had every opportunity they asked.

Again, it is insisted that affidavits were used, and not depositions; that no cross-examination was had, &c. But all this
79 was by consent, or at least without objection. They offered affidavits themselves; had all the time they sought for presenting their testimony. They never asked to take depositions or the privilege of cross-examination or time to produce more testimony, of which they now say they have an abundance. They made no objection as to the manner in which the testimony was presented, and I doubt not that if all the testimony had been by oral examination of witnesses in open court such irregularity, if acquiesced in at the time, would have furnished no ground for setting aside the decree based thereon.

He who keeps silent when he should speak must keep silent forever thereafter.

Of the merits of the case I shall add nothing to what I said before when ordering the decree, and of the duty of the court to render such a decree upon the application of either party, when there has been in fact a full compromise and settlement, I have no doubt. The application for a correction of the decree and for rehearing is denied.

DAVID J. BREWER,
Circuit Judge.

And on Saturday, November 27th, 1886, in vacation of said court, the following entry appears of record, to wit:

CEDAR VALLEY LAND AND CATTLE CO. (L'd)
against
WILLIAM N. EWING *et al.*

Now, on this day, the application of the defendants for a rehearing herein coming on for hearing, and the same having been argued by counsel and submitted to the court—now, the premises having been duly considered, it is ordered that the same be denied, and that the costs herein be taxed against the said defendants.

And now again come the said defendants, by their solic-
80 itors, and file petition for an appeal in this cause to the Supreme Court of the United States; and the following order is filed and ordered to be spread upon the records, to wit:

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
WILLIAM N. EWING and JAMES M. COBURN, Respondents.
No. 1043.

Respondents file petition for an appeal of this cause to the Supreme Court of the United States, and it is ordered that such appeal be allowed on respondents filing a bond, with security to be approved by the clerk of this court, in the sum of $500.00.

Nov. 26, 1886.
(Signed) DAVID J. BREWER,
Circuit Judge.

Said petition for an appeal is in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Equity.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
WILLIAM N. EWING and JAMES M. COBURN, Respondents.
No. 1043.

To the Honorable David J. Brewer, judge of the circuit court of the United States in and for the western division of the western district of Missouri:

This day come William N. Ewing and James M. Coburn and
pray the court to enter an order of this court allowing an appeal
81 and to allow an appeal of this cause to the Supreme Court
of the United States, and to fix the amount of bond and security to be required, and that such bond and security shall be approved by the clerk of this court.

WILLIAM N. EWING AND
JAMES M. COBURN,
Respondents,
By KARNES AND KRAUTHOFF,
WATERS AND HENRY N. ESS,
Their Attorneys.

And on the 3rd day of Dec., 1886, the following order was filed:

CEDAR VALLEY LAND & CATTLE CO.
against
WM. N. EWING *et al.*

This day come defendants, by their solicitors, and present to th court their bond for appeal and a citation in the above-entitled cause; whereby said bond is by the court examined and approved and said citation signed.

A. KREKEL, *Judge.*

Said bond is as follows, to wit:

UNITED STATES OF AMERICA, *sct:*

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
vs.
JAMES M. COBURN and WILLIAM N. EWING, Respondents.
} In Equity. No. 1043.

Know all men by these presents that we, William N. Ewing, 82 and James M. Coburn, as principals, and O. P. Dickinson and L. J. Talbott, as sureties, are held and firmly bound unto the Cedar Valley Land and Cattle Company, Limited, its successors and assigns, in the sum of five hundred dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of Dec., A. D. 1886.

Upon this express condition, to wit: Whereas the above-named James M. Coburn and William N. Ewing have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above-named James M. Coburn and William N. Ewing shall prosecute their said appeal to effect and answer all damages and costs if they shall — make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

WM. N. EWING. [SEAL.]
JAMES M. COBURN. [SEAL.]
O. P. DICKINSON. [SEAL.]
L. J. TALBOTT. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

A. KREKEL, *Judge.*

83 UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said division and district, do hereby certify that the foregoing is a true and complete transcript of the pleadings, proceedings, and final decree in the cause wherein The Cedar Valley Land and Cattle Company, Limited, is complainant, and William N. Ewing and James M. Coburn are defendants as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office, in the city of Kansas, this 18th day of February, A. D. 1887.

{ Seal of the United States Circuit Court for the Western
District of Missouri, Western Division. }

H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

Endorsed on cover: W. Missouri C. C. U. S. No. 139. James M. Coburn and William N. Ewing, appellants, *vs.* The Cedar Valley Land and Cattle Company (Limited). Filed October 4, 1887.